(26,215)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 748.

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS BULAH COAL COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422. December Sess., 1912.

J. A. Gleason John H. Minds H. W. Moore G. M. Roads	James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, *Petitioner,* *vs.*
Francis I. Gowen John G. Johnson	Pennsylvania Railroad Company.

PETITION TO ENFORCE ORDER OF INTERSTATE COMMERCE COMMISSION.

1913	February	7	Petition filed. Order on defendant to plead, answer or demur within 30 days filed.
"	"	10	Proof of service of copy of petition and order to plead, &c., filed.
"	March	4	Demurrer filed.
"	July	21	Order overruling demurrer with leave to defendant to file a plea filed.

"	August	20	Order for the appearance of John G. Johnson, Esquire, for defendant filed.
			Plea filed.
1915	October	8	Order to place case on Trial List filed.
"	November	9	Jury called.
"	"	10	Trial continued.
"	"	11	Juror withdrawn and cause continued.
1916	April	5	Petition to amend original petition filed.
"	"	8	Answer of Pennsylvania Railroad Company to petition for leave to amend original petition filed.
"	"	10	Order, Dickinson, J., granting leave to plaintiff to amend petition filed.
"	"	14	Defendant's pleas to amended petition filed.
"	October	7	Subpoena to Michael Trump returned "served" and filed.
"	"	9	Jury called (see minutes).
"	"	10	Trial continued.
"	"	11	Trial continued.
"	"	12	Verdict for plaintiff for Sixteen thousand ninety-two and 92-100 ($16,092.92) Dollars.
"	"	16	Defendant's motion and reasons for a new trial filed.
"	November	1	Argued sur motion for new trial.
"	"	6	Opinion, Dickinson, J., discharging rule for new trial filed.
"	"	8	Supplemental Opinion sur motion for new trial filed.
"	"	10	Bill of Exceptions filed.
			Order sealing bill of exceptions filed.
			Praecipe for judgment filed. Judgment accordingly.

Opinion, Dickinson, J., allowing counsel fee of $3250.00 filed.

" " 14 Petition and order allowing writ of error filed.

Bond sur writ of error approved and filed.

Assignments of error filed.

Writ of error allowed and issued and copy thereof lodged in Clerk's office for adverse party.

Citation allowed and issued.

Citation returned service accepted and filed.

Praecipe sur transcript of record filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, plaintiff, and Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States at Philadelphia, the 14th
(Seal) day of November, in the year of our Lord one thousand nine hundred and sixteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before DICKINSON, *J.*

Allowed—

BY THE COURT.

Attest—

GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as BULAH COAL COMPANY,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

PETITION.
Filed Feby. 7, 1913.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, having his principal place of business at Ramey, in Bigler Township, Clearfield County, and State of Pennsylvania, and who is a citizen and resident of Clearfield County, in the said State of Pennsylvania, humbly complaining shows your Honors:

I. Your petitioner is lawfully and rightfully entitled to receive and does hereby claim from the defendant above named the sum of Thirty-one thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Nine thousand three hundred seventy-eight dollars and seventy-two cents ($9,378.72), being the sum of Forty-one thousand ninety-

four dollars and twenty-nine cents ($41,094.29) with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A" and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioner the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the twenty-fifth day of June, 1902, to October 1, 1904, the petitioner was lessee of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and during said period, petitioner was continuously engaged in mining

coal at said mines and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantity petitioner was always able and prepared during said period to mine, ship and sell, had he been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioner with sufficient cars to transport his coal as aforesaid, nor did it furnish to petitioner his proper pro rata of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioner's mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4, and having, in common with it, their sole outlet to market by way of defendants' lines, whereby defendant violated its duty as a common carrier and petitioner was put to great and unjust disadvantage and was unable to ship coal to market which he was able to mine, and for the sale of which he had orders for delivery to points outside of the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioner's need for cars and because of such unjust di[illegible]mination against petitioner in the daily car distribu[illegible]n of cars upon defendant's line, and in particular upon the Tyrone Division, petitioner was damaged and suffered loss as producer, shipper and seller of coal in the interstate coal trade and was deprived of profits which he would otherwise have made upon coal which he was unable to ship and sell, and for which he was unable to accept contracts, although such contracts were avail-

able, by reason of defendant's undue and wrongful discrimination and refusal to properly supply him with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone and Clearfield Railway, on the Tyrone Division of said defendant in close proximity to the Webster No. 4 mine owned by petitioner, and have a common outlet with petitioner's said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company, and there are no circumstances or conditions of carriage as against petitioner's mine, Webster No. 4 aforesaid.

Between June 25, 1902, and October 1, 1904, petitioner made daily requests and gave daily orders for coal cars to be delivered to his said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but was denied and refused cars and was unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioner was at different times and for varying periods of time compelled to close his operation and hold his mine idle, whereby his miners and laborers removed, his organization and plant became demoralized and disorganized, and whereby petitioner was prevented from filling valuable contracts, or from accepting and securing other valuable contracts, to his great damage as herein set forth.

During the period from June 25, 1902, to October 1, 1904, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 105,521 "assigned" (arbitrary) cars, which said cars were assigned as "individual" and "foreign" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division, and did not enter

into the distribution of the coal cars among the mines of said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioner's mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division in which petitioner's said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioner's mine, Webster No. 4.

V. Your petitioner, on the 28th day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practice of defendant to the prejudice of petitioner and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainant therein reparation and damages to such amount as it might be ascertained that said complainant had suffered.

Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Wash-

ington, D. C., on Docket No. 1136, Opinion No. 1455, dated December 5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioner as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1136, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A" and made a part of this petition.

VII. Petitioner avers that a true copy of the aforesaid orders of the Interstate Commerce Commission, dated December 5, 1910, Opinion No. 1455, Docket No. 1136, and March 11, 1912, Opinion No. 1833, Docket No. 1136, were duly served upon defendant in the above entitled cause and demand made that defendant pay petitioner the sum claimed in this petition and as set forth in the aforesaid order of the Commission dated March 11, 1912, "Exhibit C", hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioner or any one in his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, as aforesaid, respectfully prays:

First—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth—That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Pennsylvania Railroad Company for the sum of Forty-one thousand ninety-four dollars and twenty-nine cents ($41,094.29), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

Fifth—That your Honorable Court may take such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

JAS. H. MINDS.

STATE OF PENNSYLVANIA, *ss.*

James H. Minds, one of the above named petitioners, being duly sworn according to law, doth depose and say that the facts contained in the foregoing petition are true, to the best of his knowledge and belief.

JAS. H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.

JOHN B. McGRATH,
(Seal) *Notary Public.*
My commission expires February 27, 1913.

INTERSTATE COMMERCE COMMISSION
Washington

I, JOHN H. MARBLE, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered March 11, 1912, in cases No. 1136, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company against Pennsylvania Railroad Company, the originals of which are now on file and of record in the office of this Commission.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal
(Seal) of the Commission, this 18th day of January, 1913.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, trading as W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, trading as the BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as the BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911. *Decided March* 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in distribution of coal cars.

David L. Krebs, Harry White, and *A. M. Liveright* for Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen, and *Murray & O'Laughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

In *Joynes v. P. R. R. Co.*, 17 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in *Joynes v. P. R. R. Co., supra,* had been announced,

the Circuit Court of the United States for the Eastern District of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the Court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also *Morrisdale Coal Co. v. P. R. R. Co.*, 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in *Joynes v. P. R. R. Co., supra,* there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356; *Jacoby & Co. v. P. R. R. Co.*, 19 I. C. C., 392; and *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to

exercise jurisdiction to award damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon reargument was restated at $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on reargument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share to these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hills-

dale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum of $17,500 in an action in the state courts similar to this proceeding, but relating only to intrastate traffic. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 229 Pa., 61; 78 Atl., 28.

CLAIM OF JACOBY & COMPANY.

We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(*e*) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making

an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the *Hillsdale case, supra,* the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that

mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the state of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3

was $1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates $155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold, and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60.

(*e*) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a nondiscriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the

basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justiciable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the state courts, to which reference has heretofore been made, the Supreme Court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

> "As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in

excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant

be, and it is hereby authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,-127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Com-

mission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Jams H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the first day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
(Seal) *Secretary.*

INTERSTATE COMMERCE COMMISSION,
Washington.

I, JOHN H. MARBLE, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered December 5, 1910, in cases No. 1136, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, against Pennsylvania Railroad Company, the originals of which are now on file and of record in the office of this Commission.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal
(Seal) of the Commission, this 18th day of January, 1913.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1455.

Before the
INTERSTATE COMMERCE COMMISSION.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

SAME.

REPORT AND ORDER OF THE COMMISSION.

Submitted February 1, 1909. *Decided December* 5, 1910.

Upon complaint that the defendant's system of rating mines and distributing its coal-car equipment is discriminatory, it is so found, and *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356, and the other cases in that group of cases, are cited and reaffirmed. The question of damages is reserved for further argument.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson, David L. Krebs and *James H. Gleason* for complainants.

Francis I. Gowen, George V. Massey and *Murray & O'Laughlin* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

On or about April 12, 1904, a member of the copartnership that filed the first of these two complaints died, and his place in the firm was taken by his widow. This change in interest is the explanation of the two complaints; the first one prays for damages in the sum of $80,174.60, alleged to have been sustained prior to that date, and the second demands an award in the sum of $75,226.99 for damages alleged to have been suffered after that date. The claims in each case are based upon the allegation that the defendant was guilty of unjust discriminations against the complainants in the distribution of its coal-car equipment during the period covered by the complaints and also failed to furnish the complainants with an adequate supply of cars. We are also asked to require the defendant hereafter to furnish the complainants, in the daily distribution, with their just proportion of its available coal-car equipment, that proportion to be ascertained by the physical output capacity of the mines served by the defendant, without regard to their so-called commercial capacity.

This question in all of its aspects was fully considered in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356; *Jacoby & Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 386; and the other cases there referred to and which were disposed of at the same time. It will not be necessary therefore again to consider it here. It will suffice to say that we find upon this record that the defendant, during the period covered by these actions, was guilty of an undue and unjust discrimination against the complainants, by reason of the enforcement of the rules then in effect for the distribution of its available coal cars among the mining operations that it served; and an order in that regard will be entered herein substantially similar to the orders entered in the cases above mentioned. As those

orders require the defendant to put in effect for the future a non-discriminatory system of car distribution no further order in that regard need be entered here.

In addition to the damages alleged to have been suffered by the complainants by reason of the defendant's rules of distribution, there are one or two other matters that must be mentioned. The mine of these complainants, known as Webster No. 4, is in the vicinity of the operations involved in *Jacoby & Co. v. P. R. R. Co., supra,* and is connected by a switch track with the defendant's Moshannon branch. It produces a superior quality of soft coal that is used for steaming and forging purposes and also as a domestic coal; it is in good demand and brings a high price in the markets of consumption. The tipple, mining machinery, and the general development of the mine were designed for a shipping capacity of from 1,000 to 1,200 tons of coal per working day. Its capacity, as rated by the defendant in 1906, was 16 thirty-five ton cars per day, or 560 tons, indicating a maximum monthly output of 14,000 tons. At the same time the defendant rated Eureka Mine No. 7, about half a mile distant on the same mineral and surface estates and belonging to the Berwynd-White Coal Mining Company, at 14 cars per day. Although defendant gave the two mines about the same rated capacity, the latter mine seems to have received not only a more substantial and regular supply, but a larger number of cars each month. On that point the defense interposed is that the petitioners received their fair proportion of the entire number of cars distributed on the Tyrone division, and therefore have no ground for complaint. A similar defense was made in *Hillsdale Coal & Coke Co. v. P. R. R. Co., supra,* but we there held that under the law a shipper has the right not only to receive its fair and full proportion and use of a carrier's equipment and facilities, but may protest against the giving to a competitor of a supply of cars in excess of his fair and just propor-

tion. We repeat that principle here. It is one of great importance in coal-mining operations, as all will agree who have looked into such matters. One of the evils lying at the root of the trouble is that the mine that has a larger and more constant supply of cars may not only be operated at less cost, but, what is equally if not more important, such a mine is able to attract miners from the other mines because of the assurance it gives of a more constant opportunity to earn a daily wage.

The greater regularity of the car supply made available to the Berwynd-White Coal Mining Company operations, as is pointed out in *Jacoby & Co. v. P. R. R. Co., supra,* is partly explained by the fact that that company not only owned a large supply of private cars, but had railway-fuel contracts which, under the rules for distribution then in effect, resulted in giving it a large and regular number of assigned cars. This discrimination, as was pointed out in the cases referred to, resulted from the rules then in effect and need not be further considered here. In this connection it may be well to say that the complainants predicate a part of their damages upon the fact that in 1902 the defendant sold 1,000 of its system coal cars to the Berwind-White Coal Mining Company, 500 to the Keystone Coal & Coke Company, and 700 to the Ellsworth Coal Company. The defendant meets this claim by asserting that if these cars had been retained as system cars they would have added to the car supply of the complainants during the time in question only a fraction of a car per day. We have not verified this assertion, but any damage resulting from the sale by the defendant of a portion of its own equipment to other coal companies is substantially covered by our finding that the proper practice in the distribution of all available cars was to count all assigned cars against the equipment of the mine receiving them.

The complainants characterize as a special dis-

crimination against their mine the fact, as is alleged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusions or anything to indicate that the complainants, in those respects, were put by the defendants on any less favorable basis than their competitors.

Another fact which is made a ground for a claim of damages is that in 1903 the complainants asked the privilege of purchasing certain cars for use in transporting coal from their mine, but were informed by the defendant that they were discouraging the use of new individual car contracts. Later the complainants negotiated for the purchase of 100 wooden gondola cars, which at that time were in actual use in the transportation of coal by another mining company over the lines of the defendant; but the defendant declined to permit their use by the complainant on the ground that the cars were not up to standard. The negotiations were therefore not carried to a conclusion, but apparently the cars were still in use, when these complaints were filed, for the transportation of coal by the defendant for other shippers. Later there was some controversy with respect to the use of 25 new steel cars purchased by the complainants for their own use, but which were kept temporarily out of service, pending some dispute between the complainants and the de-

fendant with respect to the terms of the contract covering their use as private cars.

While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations. We have condemned that system in the cases heretofore alluded to and found it to be unduly and unjustly discriminatory, and we have so found here. But as was the case with those proceedings we desire further light on the amount of the damages thus sustained. The latter question will therefore be set for further argument at the time when the same question is argued in the group of cases heretofore mentioned. The special reasons for entering upon the consideration of the question of damages in these cases have been explained in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner*, dissenting: Without restating my views in this proceeding, I desire it to be understood that my dissent in the case last cited is equally applicable here. In that dissent Commissioner Clements joined. It is the desire also of Commissioner Lane to be understood as entertaining in this proceeding the same views respecting the lawful basis for rating mines for the distribution of coal cars that are expressed in his dissenting opinion in the case last mentioned.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal oper-

ators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants herein and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1136, awarding to the complainant the sum of Thirty-one Thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the report and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainant and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

H. W. Moore,
Attorney for Petitioner.

ORDER OF COURT.
Filed Feby. 7, 1913.

And now, February 7th, 1913, the petition of James H. Minds, complainant in the above proceedings having been filed and the averments thereof considered, it is ordered that the Pennsylvania Railroad Company, defendant, be and is directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition, together with a copy of this order or judgment *sec. leg.*

J. W. THOMPSON, *J.*

DEMURRER OF DEFENDANT TO PETITION OF THE PETITIONER.
Filed March 4, 1913.

The Pennsylvania Railroad Company, the defendant in the above-entitled action, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows:

1. That it appears from the petition itself that the petitioner is not entitled to maintain the action.

2. That it appears from the petition that the action or proceeding has been brought to recover the amount of a certain award made in favor of the petitioner and against the defendant by the Interstate Commerce Commission, which said award the said Commission was without authority to make, because the authority conferred by the Acts of Congress creating the said Commission and defining its powers and jurisdiction does not extend to nor include the making of awards of the character of that which forms the

basis of the present action, nor has the said Commission been empowered by said Acts of Congress to entertain claims for damages of the character asserted by the petitioner in the proceeding instituted by it before the Commission which eventuated in the making of the said award.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN G. JOHNSON,
Solicitor and Counsel for Defendant,
The Pennsylvania Railroad Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN G. JOHNSON,
Of Counsel for Defendant, The Pennsylvania Railroad Company.

Philadelphia, March 1, 1913.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } *ss.*

Lewis Neilson, being duly sworn, deposes and says: I am Secretary of the Pennsylvania Railroad Company, the above-named defendant. The foregoing demurrer is not interposed for delay.

LEWIS NEILSON.

Sworn to before me this 28th day of February, 1913.

HENRY E. CAIN,
(Seal) *Notary Public.*
Commission expires February 21, 1915.

ORDER OF COURT.
Filed July 21, 1913.

And now, to wit, this 21st day of July, 1913, it is ordered that the Demurrer in the above entitled cause be overruled with leave to plead, etc.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PLEA.
Filed Aug. 20, 1913.

Defendant in the above pleads "Not Guilty."
August 20th, 1913.

JOHN G. JOHNSON,
Attorney for said Defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1912. No. 2422.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

December Term, 1912. No. 2424.

JAMES H. MINDS and JULIA A. MATZ, trading as BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

PETITION TO AMEND ORIGINAL PETITION.

To the Honorable, the Judges of the said Court:

The undersigned petitioners respectfully represent:

1. That the above cases were originally begun before the Interstate Commerce Commission, the division into two actions having been made necessary by the death of William J. Matz, one of the partners of the original firm, on April 12, 1904. The petition for the first period was brought by James H. Minds, surviving and liquidating partner of James H. Minds, and William J. Matz, lately trading as Bulah Coal Company; and the petition for the seond period was brought by James H. Minds and Julia A. Matz, trading as Bulah Coal Company.

2. When the petitions were filed with the Inter-

state Commerce Commission the clerk who docketed them assigned to the petition for the first period "Docket No. 1137" and to the petition for the second period "Docket No. 1136."

3. Testimony and argument having been heard by the Interstate Commerce Commission, an opinion was filed by said Commission on December 5, 1910, Opinion No. 1455, in which it was found that the defendant had unlawfully discriminated against the petitioner in the distribution of coal cars, as compared with other shippers similarly situated. Said Commission on March 11, 1912, filed a supplemental opinion No. 1833, assessing the damages for said unlawful discrimination at $50,307.05, with interest from June 28, 1907.

4. In Opinion No. 1455, above referred to, in discussing the two actions, the Interstate Commerce Commission treated the docket number of the first period as the docket number of the second period, and the docket number of the second period as the docket number of the first period. In the supplemental Opinion No. 1833, however, this error was corrected and the findings of fact and the division of the damages into two awards, according to the periods, were properly found and the correct amounts were awarded to the parties named in the respective periods.

5. Owing to the confusion caused by the manner in which the cases were originally docketed, and the reference to them in the original Opinion No. 1455, your petitioner in bringing suit upon the awards in your Honorable Court was led into error and filed the two petitions which it is now sought to amend, with the amounts awarded reversed as to the parties, that is the amount sued for on behalf of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, for the first period—$31,715.57, should have

been $18,591.48, as appears by reference to the awards; and the amounts sued for on behalf of James H. Minds and Julia A. Matz, trading as Bulah Coal Company, for the second period—$18,591.48, should have been $31,715.57, as appears by reference to the awards.

6. These cases coming on for trial, the two petitions were consolidated by agreement of counsel and tried as one cause of action, James H. Minds being entitled to one-half of the amount awarded in each period in his own right and Julia A. Matz being entitled to one-half of the amount awarded in each period; in the first period as the Executrix and the sole legatee of William J. Matz, deceased, and the second period in her own right. The proposed amendments, therefore, introduce no new cause of action, nor any other parties than those already of record, nor do they alter the respective amounts due to those parties, but merely alter the petitions so as to make the averments therein contained agree with those in the awards upon which suit is brought, all of which appears upon the face of the record.

WHEREFORE your petitioners pray that they may be allowed to amend the petitions in the two cases as follows:

Amend petition No. 2422

By striking out from paragraph I the words "Thirty-one thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57)" and substituting therefor "Eighteen Thousand five hundred ninety-one Dollars and forty-eight cents ($18,591.48)." In the same paragraph by striking out the words "Nine Thousand three hundred and seventy-eight dollars and seventy-two cents ($9,378.72)" and substituting therefor "Five Thousand four hundred and ninety-seven Dollars and ninety-one cents ($5,497.91)." In the same paragraph by striking out the words "Forty-one Thousand ninety-four dollars and twenty-nine cents ($41,-

094.29)," and substituting therefor the words "Twenty-four Thousand eighty-nine Dollars and thirty-nine cents ($24,089.39)."

In paragraph V by striking out after the words "Docket No." the numeral "1136" and substituting therefor the numeral "1137."

In paragraph VI by striking out after the words "Docket No." the numeral "1136" and substituting therefor the numeral "1137."

In paragraph VII by striking out after the words "Docket No." the numeral "1136" in the two places in which it occurs in said paragraph and sustituting therefor in each place the numeral "1137."

In the Fourth prayer of said petition by striking out the words "Forty-one Thousand ninety-four dollars and twenty-nine cents ($41,094.29)" and substituting therefor the words "'Twenty-four Thousand eighty-nine Dollars and thirty-nine cents ($24,089.39)."

Amend petition No. 2424

By striking out from paragraph I the words "Eighteen Thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48)" and substituting therefor the words "Thirty-one Thousand seven hundred fifteen Dollars and fifty-seven cents ($31,715.57)." In the same paragraph by striking out the words "Five Thousand four hundred ninety-seven dollars and ninety-one cents ($5,497.91)," and substituting therefor the words "Nine Thousand three hundred seventy-eight Dollars and seventy-two cents ($9,378.72)." In the same paragraph by striking out the words "Twenty-four Thousand eighty-nine dollars and thirty-nine cents ($24,089.39)," and substituting therefor the words "Forty-one Thousand ninety-four Dollars and twenty-nine cents ($41,094.29)."

In paragraph V by striking out after the words "Docket No." the numeral "1137" and substituting therefor the numeral "1136."

In paragraph VI by striking out after the words "Docket No." the numeral "1137" and substituting therefor the numeral "1136."

In paragraph VII by striking out after the words "Docket No." the numeral "1137" and substituting therefor "1136."

In the Fourth prayer of said petition by striking out the words "Twenty-four Thousand eighty-nine Dollars and thirty-nine cents ($24,089.39)," and substituting therefor "Forty-one Thousand ninety-four Dollars and twenty-nine cents ($41,094.29)," so that when amended the two petitions will read as the amended petitions attached hereto.

H. W. Moore,
Attorney for Petitioners.

State of Pennsylvania, }
County of Philadelphia, } *ss.*

John H. Minds, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

John H. Minds.

Sworn to and subscribed before me
this fourth day of April, A. D.
1916.

P. A. Wilson,
(Seal) *Notary Public.*
Commission expires March 9, 1919.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1912. No. 2422.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as BULAH COAL COMPANY,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY.
Defendant.

AMENDED PETITION.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, having his principal place of business at Ramey, in Bigler Township, Clearfield County and State of Pennsylvania, and who is a citizen and resident of Clearfield County, in the said State of Pennsylvania, humbly complaining shows your Honors:

I. Your petitioner is lawfully and rightfully entitled to receive and does hereby claim from the defendant above named, the sum of Eighteen thousand five hundred ninety-one Dollars and forty-eight cents ($18,591.48), with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Five thousand four hundred ninety-seven Dollars and ninety-one cents ($5,497.91), being the sum of Twenty-four thousand eighty-nine Dollars and thirty-nine cents ($24,089.39), with legal interest thereon from June 1, 1912,

as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A" and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided, and the defendant justly and legally owes to petitioner the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the twenty-fifth day of June, 1902, to October 1, 1904, the petitioner was lessee of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and during said period, petitioner was continuously engaged in mining coal at said mines and selling it to points outside of

the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantiy petitioner was always able and prepared during said period to mine, ship and sell, had he been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioner with sufficient cars to transport his coal as aforesaid, nor did it furnish a petitioner his proper pro rata of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line the defendant unjustly discriminated against petitioner's mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4 and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioner was put to great and unjust disadvantage and was unable to ship coal to market which he was able to mine, and for the sale of which he had orders for delivery to points outside of the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioner's need for cars and because of such unjust discrimination against petitioner in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioner was damaged and suffered loss as producer, shipper and seller of coal in the interstate coal trade and was deprived of profits which he would otherwise have made upon coal which he was unable to ship and sell, and for which he was unable to accept contracts, although such contracts were available, by reason of defend-

ant's undue and wrongful discrimination and refusal to properly supply him with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone and Clearfield Railway, on the Tyrone Division of said defendant in close proximity to the Webster No. 4 mine owned by petitioner, and have a common outlet with petitioner's said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company, and there are no circumstances or conditions of carriage as against petitioner's mine, Webster No. 4, aforesaid.

Between June 25, 1902, and October 1, 1904, petitioner made daily requests and gave daily orders for coal cars to be delivered to his said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but was denied and refused cars and was unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioner was at different times and for varying periods of time compelled to close his operation and held his mine idle, whereby his miners and laborers removed, his organization and plant became demoralized and disorganized, and whereby petitioner was prevented from filling valuable contracts, to his great damage as herein set forth.

During the period from June 25, 1902, to October 1, 1904, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 105,521 "assigned" (arbitrary) cars, which said cars were assigned as "individual" and "foreign" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division, and did not enter into the distribution of the coal cars among the mines of said Division, whereby said favored com-

panies were given the cars aforesaid over and aboye and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioner's mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division in which petitioner's said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioner's mine, Webster No. 4.

V. Your petitioner, on the 28th day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practice of defendant to the prejudice of petitioner and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainant therein reparation and damages to such amount as it might be ascertained that said complainant had suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1137, Opinion No. 1455, dated December

5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioner as in paragraph 1 of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1137, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A" and made a part of this petition.

VII. Petitioner avers that a true copy of the aforesaid orders of the Interstate Commerce Commission, dated December 5, 1910, Opinion No. 1455, Docket No. 1137, and March 11, 1912, Opinion No. 1833, Docket No. 1137, were duly served upon defendant in the above entitled cause and demand made that defendant pay petitioner the sum claimed in this petition and as set forth in the aforesaid order of the Commission, dated March 11, 1912, "Exhibit C," hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioner or any one in his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds, surviving

and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, as aforesaid, respectfully prays:

FIRST.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

SECOND.—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

THIRD.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

FOURTH.—That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Pennsylvania Railroad Company for the sum of Twenty-four thousand eighty-nine Dollars and thirty-nine cents ($24,089.39), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

FIFTH.—That your Honorable Court may take such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

(Sgd.) Jas. H. Minds.

State of Pennsylvania, *ss.*

James H. Minds, one of the above-named petitioners, being duly sworn according to law, doth depose

and say that the facts contained in the foregoing petition are true, to the best of his knowledge and belief.

(Sgd.) JAS. H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.
(Sgd.) JNO. B. MCGRATH,
(Seal) *Notary Public.*
My commission expires February 27, 1913.

(See copies of Reports and Orders of Interstate Commerce Commission on page 13 of Record.)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2424.

JAMES H. MINDS and JULIA A. MATZ, trading as BULAH COAL COMPANY,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket 1137, awarding to the complainants the sum of Eighteen Thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the re-

port and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainants, and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

(Sgd.) H. W. Moore,
Attorney for Petitioners.

IN THE
DISTRICT COURT OF THE UNITED STATES,
For the Eastern District of Pennsylvania.

December Term, 1912. No. 2424.

JAMES H. MINDS and JULIA A. MATZ, Trading as BULAH COAL COMPANY,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

AMENDED PETITION.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, James H. Minds and Julia A. Matz, trading as Bulah Coal Company, having their principal place of business at Ramey, in Bigler Township, Clearfield County and State of Pennsylvania, and who are citizens of the State of Pennsylvania, and respectively residents of Clearfield County and Schuylkill County, in the said State of Pennsylvania, humbly complaining show your Honors:

I. Your petitioners are lawfully and rightfully entitled to receive and do hereby claim from the defendant above named, the sum of Thirty-one thousand seven hundred fifteen Dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Nine thousand three hundred seventy-eight Dollars and seventy-two cents ($9,378.72), being the sum of Forty-one thousand ninety-four Dollars and twenty-nine cents ($41,094.29), with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A", and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee, to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to ~~points~~ outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said city and which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the first day of Octo-

ber, 1904, to the twenty-eighth day of June, 1907, the petitioners were lessees of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railroad, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and, during said period, petitioners were continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioners with sufficient cars to transport their coal as aforesaid, nor did it furnish to petitioners their proper *pro rata* of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line, the dedefendant unjustly discriminated against petitioners' mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwynd-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside of the

State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' needs for cars and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers, and sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which they they were unable to accept contracts, although such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwynd-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone and Clearfield Railway, on the Tyrone Division of said defendant, in close proximity to the Webster No. 4 mine, owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company, and there are no circumstances or conditions of carriage as against petitioners' mines, Webster No. 4 aforesaid.

Between October 1, 1904, and June 28, 1907, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby their miners and laborers removed, their organization and plant became demoralized and disorganized, and where-

by petitioners were prevented from filling valuable contracts, or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the period from October 1, 1904, to June 28, 1907, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 143,088 "assigned" (arbitrary) cars, which said cars were assigned as "individual" and "foreign" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division, and did not enter into the distribution of the coal cars among the mines of said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioners' mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division, in which petitioners' said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said division, over and above the proper proportion to which said division was properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Webster No. 4.

V. Your petitioners, on the twenty-eighth day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof, or supplemental there-

to, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation and damages to such an amount as it might be ascertained that said complainants had suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1136, Opinion No. 1455, dated December 5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of facts and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioners as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1136, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A," and made a part of this petition.

VII. Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1136, was duly served upon defendant in the above entitled cause, and demand made that defendant pay petioners the sum claimed in this petition and as set forth in the aforesaid order of the Commission dated March

11, 1912, "Exhibit C", hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the Acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, as aforesaid, respectfully pray:

First—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Forty-one thousand ninety-four Dollars and twenty-nine cents ($41,094.29), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

Fifth—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

(Sgd.) JAS. H. MINDS.

STATE OF PENNSYLVANIA, *ss.*

James H. Minds, one of the above named petitioners, being duly sworn according to law, doth depose and say that the facts contained in the foregoing petition are true, to the best of his knowledge and belief.

(Sgd.) JAS. H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.

(Sgd.) JNO. B. MCGRATH,
(Seal) *Notary Public.*
My Commission Expires February 27, 1913.

(See copies of Reports and Orders of Interstate Commerce Commission on page 13 of Record.)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as BULAH COAL COMPANY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1136, awarding to the complainant the sum of Thirty-one Thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the report and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainant, and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

(Sgd.) H. W. MOORE,
Attorney for Petitioner.

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY.
Filed April 8, 1916.

To the Honorable the Judges of said Court:

The Pennsylvania Railroad Company, the defendant in the above entitled action, respectfully submits that leave should not be granted to file the amended petition which the plaintiff asks leave to file, for the following reason:

The proceeding, as the petition discloses, is one brought to recover the amount of an award averred in the petition to have been made by the Interstate Commerce Commission on March 11, 1912.

The award, as now appears, for the recovery of which the proceeding was brought was not made in favor of the plaintiff, and the purpose of the present petition is to permit the plaintiff to so amend its original petition as to enable it now to recover the amount of an award which was made by the Interstate Commerce Commission in favor of the petitioner.

The Interstate Commerce Act provides that "a petition for the enforcement of an order (*i. e.*, of the Interstate Commerce Commission) for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

The date of the order making the award for the recovery of which the the plaintiff now desires to proceed was, as already stated, March 11, 1912, so that at the present time more than four years have elapsed from the date thereof. The petitioner, therefore, it is respectfully submitted cannot now file a petition for the enforcement of such order.

FRANCIS I. GOWEN,
For Defendant.

April 8, 1916.

ORDER OF COURT.
Filed April 10, 1916.

And now, to wit, this 10th day of April, 1916, Amendment to Petition allowed, Exception noted for Defendant.

By the Court.

DICKINSON, *J.*

SUR AMENDED PETITION.
PLEAS.
Filed April 14, 1916.

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1. The defendant pleads "Not Guilty."

2. And for a further plea the defendant says that the plaintiff is not entitled to maintain the present proceeding because it says that the order of the Interstate Commerce Commission, for the enforcement of which the present proceeding has been instituted, was made on March 11, 1912, and by the Act of Congress under which said order was made, it is provided that a petition for the enforcement of an order of the character of that for the enforcement of which the present proceeding is brought, shall be filed in the Circuit Court within one year from the date of the order and not after the expiration of such year, and the defendant avers that the petition in the present case for the enforcement of the order making the award in favor of the plaintiff, the amount of which it is seeking to recover, was not filed in this Court within one year from the date of the order, as will appear by an inspection of the record.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Of December Term, 1912. No. 2422 and 2424.

No. 2422. Dec. Term, 1912.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as the BULAH COAL COMPANY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY.

No. 2424. Dec. Term, 1912.

JAMES H. MINDS and JULIA A. MATZ, trading as the BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

BILL OF EXCEPTIONS.
Filed Nov. 10, 1916.

Be it remembered, that in the said term of December, A. D. 1912, came the said plaintiffs into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiffs declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the District aforesaid before the Honorable Oliver B. Dickinson, Judge of the said Court, the ninth

day of October, A. D. 1916, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiffs as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said defendant did except to the rulings of the Court as herein appears.

Before Honorable OLIVER B. DICKINSON, *J.*, and a Jury.

Post Office Building, Philadelphia, Pa., Monday, October 9th, 1916, at 10 o'clock A. M.

Present:

JOHN H. MINDS, ESQ.,
JAMES A. GLEASON, ESQ.,
GEORGE M. ROADS, ESQ., and
H. W. MOORE, ESQ., for the Plaintiff.

FRANCIS I. GOWEN, ESQ., and
HENRY W. BIKLE, ESQ., for the Defendant.

Transcript of Testimony, Charge of the Court and Exceptions.

Jurors sworn and affirmed Monday, October 9th, 1916.

Mr. Roads opened to the jury on behalf of the plaintiff.

Mr. Bikle opened to the jury on behalf of the defendant.

Counsel agree that the two cases may be submitted to the same jury on the same testimony.

THE COURT: Gentlemen of the Jury, there are two cases being submitted to you. It is necessary for the reason given you that there be two cases, because the parties claimant are not precisely the same in each case, but each case grows out of the same transaction. The cases will be supported by the same evidence, by the same witnesses, so for the convenience of all concerned we are submitting both cases to you at the same time. But when you come to make your awards you will separate them and render your verdict in each case as if that were the only case submitted.

PLAINTIFFS' EVIDENCE.

MR. ROADS: If the Court please the plaintiff offers in evidence the report and order of the Interstate Commerce Commission under the hand and seal of the Commission, Opinion No. 1455, in a suit wherein James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, is the plaintiff and the Pennsylvania Railroad Company is the defendant; and also in the suit wherein James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, is the plaintiff against the Pennsylvania Railroad Company; the first one being numbered 1137 Interstate Commerce Commission number and the second No. 1136, dated December 5, 1910, and I propose to read from that report certain findings of fact.

MR. GOWEN: We object to the offer of the report as a whole in evidence. We have no objection to the admission in evidence of such portions of the report as contain findings of fact by the Commission.

THE COURT: Read upon the record what you regard as findings of fact which you are offering in evidence. I do not recall that this Act of Congress makes the report in its entirety evidence, but merely the findings.

MR. ROADS: We thought the proper way to offer the report was to offer the report and read certain extracts.

THE COURT: In order to preserve your position you offer it in your own form and counsel can put their objections in the form in which they wish them to appear, and we will give you a ruling on it.

Counsel for plaintiff may read upon the record what they deem to be findings of fact either in the report or in the order itself, and then, if any of those are objected to they will be passed upon by the Court and those admitted may be directed to the jury. The objection to this extent and within that limitation is overruled. Beyond that it is sustained.

MR. ROADS (reading): "On or about April 12th, 1904, a member of the copartnership that filed the first of these two complaints died and his place in the firm was taken by his widow."

THE COURT: Mr. Gowen, you understand that if any of these specific findings are objected to you are to note them.

MR. GOWEN: We have no objection to that.

MR. ROADS (reading): "* * * we find upon this record that the defendant, during the period covered by these actions, was guilty of an undue and unjust discrimination against the complainants by reason of the enforcement of the rules then in effect for the distribution of its available coal cars among the mining operations that it served."

"The mine of the complainants, known as Webster No. 4, is connected by a switch track with the defend-

ant's Moshannon branch. It produces a superior quality of soft coal that is used for steaming and forging purposes and also as a domestic coal; it is in good demand and brings a high price in the markets of consumption. The tipple, mining machinery, and the general development of the mine were designed for a shipping capacity of from 1000 to 1200 tons of coal per working day. Its capacity, as rated by the defendant in 1906, was 16 thirty-five ton cars per day, or 560 tons, indicating a maximum monthly output of 14,000 tons. At the same time the defendant rated Eureka Mine No. 7, about half a mile distant on the same mineral and surface estates and belonging to the Berwynd-White Coal Mining Company, at 14 cars per day."

"* * * the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations. We have condemned that system in the cases heretofore alluded to and found it to be unduly and unjustly discriminatory, and we have so found here."

I read now the order of the Interstate Commerce Commission under its hand and seal at its general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the fifth day of December, A. D. 1910, stating the same cases:

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and it appearing that it has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of for-

eign railway fuel cars, private cars and system fuel cars, in the record herein referred to as 'assigned cars' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars.

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants herein and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

MR. ROADS: I offer in evidence the opinion under the hand and seal of the Interstate Commerce Commission, No. 1833, in the cases already stated upon the record.

MR. GOWEN: We shall have to object to the admission in evidence of the thing as a whole. We have no objection to the admission of the findings of fact.

THE COURT: The objection may be entered. We understand that is in principle the same objection made before and the same ruling is made.

MR. ROADS (reading): "Following our conclusion in Bulah Coal Co. vs. P. R. R. Co., 20 I. C. C. 52, that the defendant had unlawfully discriminated against these complainants * * *"

MR. GOWEN: Mr. Roads has just come to the point where we make special objection.

THE COURT: This is the figure objection?

MR. GOWEN: We object to the admission in evidence of any portion of the report or opinion of the Commission which assesses the damages which in the

judgment of the Commission the complainants were entitled to on the ground that that is not a finding of fact within the meaning of the law.

THE COURT: Counsel may read into the record and to the jury any finding of facts incorporated in the order of what the amount of damages sustained by the respective complainants was.

Exception noted for defendant by direction of the Court.

MR. ROADS (reading): "Following our conclusion, in Bulah Coal Co. vs. P. R. R. Co. 20 I. C. C. 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907."

"In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

"(a) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(b) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(c) That if the complainants had received their proper proportion of the cars available, for distribution they could have mined, sold and shipped 120,415.68 tons during the first period and 214.257.12 tons during the second period: that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in

the first period and 71,257.12 tons for the second period, and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(d) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60."

MR. GOWEN: I suppose that it would not be necessary to renew objection to each statement of the amount of the award as it occurs in these findings.

THE COURT: No. What I had in mind was that all he was going to read was the figures and it just occurred to me that the ruling is not as inclusive as it should have been. The ruling is that any finding of fact incorporated in the order may be read. This includes the finding as to the amount of the damages and exception is allowed to the defendant.

Exception noted for defendant by direction of the Court.

"(e) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a nondiscriminatory share of the car supply had been received, and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents

during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action, and the damages awarded on that ground aggregate $35,290.45."

MR. ROADS: We now offer in evidence the orders of the Interstate Commerce Commission under the hand and seal of the Commission under the heading "Supplemental Orders":

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912," under the heading "James H. Minds and Julia A. Metz, trading as Bulah Coal Company vs. The Pennsylvania Railroad Company."

MR. GOWEN: The defendant objects to the admission in evidence of the orders of the Commission referred to on the ground that they embody no findings of fact.

THE COURT: Is that the final order fixing the amount?

MR. ROADS: These are the final orders, yes.

THE COURT: Any fact, including the facts, if found, of the amount of the damage sustained by the respective parties, may be read upon the record and is admitted in evidence.

Exception noted for defendant by direction of the Court.

MR. ROADS (reading): "This case coming on to be heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together

with the report herein of December 5, 1910, 20 I. C. C. 52, and all the findings and conclusion in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz * *"

THE COURT: This is the order to pay the amount?

MR. ROADS: The order to pay the amount.

THE COURT: I do not think we are concerned with that. I thought this was the order fixing the amount which they thought to be the damage. This is merely directing them to pay.

MR. ROADS: Yes.

THE COURT: Of what value is that to us?

MR. ROADS: Because it states the purpose.

THE COURT: I am ruling that the figures are findings of fact, but we are not concerned with the other fact, that they were authorized to pay or directed to pay or requested to pay.

MR. ROADS: It gives the reason and the ground upon which that is ordered to be paid.

THE COURT: You may read upon the record the finding of the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum, from June 28th, 1907, as the amount of reparation found for defendant's discrimination and distribution of coal cars, which discrimination is also found to have been unlawful and unjust.

MR. ROADS: I can begin then where I left off.

"It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendants'

discrimination in distribution of coal cars, which discrimination has been found by the Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

MR. ROADS: In No. 1137 we offer in evidence the order and finding of the Interstate Commerce Commission under the hand and seal of the Commission in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company vs. The Pennsylvania Railroad Company, as follows:

"It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum, from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

JAMES H. MINDS, sworn.

By MR. ROADS:

Q. You are the plaintiff in these two suits, are you not? You are the James H. Minds that is mentioned as one of the plaintiffs in the second suit and the surviving partner of the firm of Minds and Matz?

A. Yes.

Q. State whether or not you received the amounts that were awarded the plaintiffs in this case by the Interstate Commerce Commission, from the defendant, the Pennsylvania Railroad Company?

A. I did not.

No cross-examination.

It is admitted by counsel for the defendant that the orders of the Interstate Commerce Commission were served upon the defendant company.

THE COURT: Is that made a condition precedent to your right to bring the action? Because if it is, you are entitled to have the fact that the order was made go in.

MR. ROADS: We have it in the admission, if your Honor please, that the copies of the orders of the Interstate Commerce Commission were served upon the Pennsylvania Railroad Company, and we have the testimony of Mr. Minds that they were not paid. I think that covers it.

If the Court please, subject to the right to make a claim and establish our claim for counsel fees under the statute, which we can do, I suppose, later in the case—

THE COURT: I do not see how that question can arise until the precedent fact of a recovery is determined.

MR. ROADS: I want to say that subject to that we rest.

THE COURT: What I had in mind, so far as the real issue is concerned here, the fact whether the Commission made an order or whether they did not make an order is of no value to us here. What we want to determine is the amount of damages to which you are entitled. But if the fact that they made an order is a condition precedent to your right to maintain this action, of course you could show it, because you could not show your right to maintain the action without it.

MR. ROADS: Yes, sir. I think that is in the Act.

THE COURT: I am not sure whether it is or whether it is not, but if you choose to re-offer that

you can use your own judgment about it, whether to leave the record as it stands or whether to re-offer the order.

MR. ROADS: Those final orders, your Honor, supplementary orders?

THE COURT: Yes. The thought in my mind was that we were really trying what might be called a feigned issue, and, therefore, the fact that the order was made is of no importance. The fact as to the amount of damages found is of importance, because the Act makes that evidence. So I excluded the order, that is, the order requiring payment, and permitted you to offer the evidence as a finding of fact.

MR. ROADS: We rather look upon the proceeding, not in the nature of a feigned issue, but as a judgment or an award, which goes in evidence in its entirety.

THE COURT: The point is—I suppose it is nothing more than a formality, perhaps—but what the record shows now is that you made an offer to prove that an order had been made to pay.

MR. ROADS: Yes, sir.

THE COURT: That I excluded as, in the view to which my attention was then directed, we had nothing to do with it. But if the order to pay is a *sine qua non* of your right to maintain the action, then of course you would be entitled to show it for that reason. If you are satisfied with the state of the record as it is, all right. If you want to re-offer it, you may do so.

MR. ROADS: We will make a formal offer of those supplemental orders of the Interstate Commerce Commission, two of them, under date of March 11, 1912, in evidence.

THE COURT: Do you wish to renew your objection?

MR. GOWEN: We object to that, yes, sir.

THE COURT: The objection is overruled and the order to pay is admitted, for the purpose of showing one fact, on which the plaintiff's right to maintain this action depends.

Exception noted for defendant by direction of the Court.

PLAINTIFF RESTS.

DEFENDANT'S EVIDENCE.

E. C. DAVIS, having been duly sworn, was examined as follows:

By MR. BIKLE:

Q. You are, I believe, in the employ of the Bulah Coal Company?

A. Yes, sir.

Q. Were you in the employ during the years 1902-1909 inclusive?

A. Yes, sir.

Q. And in what capacity?

A. As bookkeeper and shipping clerk.

Q. Were you familiar with the royalty paid by the Bulah Coal Company on the coal which it mined?

MR. GLEASON: We would respectfully ask counsel at this time to make an offer of what he proposes to prove by the witness on the stand.

MR. GOWEN: The defendant proposes to prove what the additional cost would have been of mining and producing the additional coal which the Commission found the plaintiff should have received cars for.

MR. GLEASON: For what purpose?

THE COURT: Oh, I think the purpose of it is sufficiently evident, Mr. Gleason. That is what they propose to show, what the cost of it would have been. Your damages would not have been—could not have been—anything except what you would have received over and above the cost.

MR. GLEASON: What is there here before the Court, your Honor, at the present time that would make this testimony competent or material? There is nothing before your Honor except the awards. Now in the light of what proposition or what evidence now before the Court—

THE COURT: I assume that your evidence, the evidence that you have produced, was brought in for the purpose of convincing the jury that your damages were a certain amount. I suppose the quest upon which the defendant is starting is to convince the jury, if the facts justify that finding, that your damage was not that much, but less than that, or perhaps nothing at all. I do not know. Is it objected to?

MR. GLEASON: We object to the testimony as incompetent, immaterial and irrelevant.

Objection overruled. Exception noted for plaintiff by direction of the Court.

(Question read, as follows: "Were you familiar with the royalty paid by the Bulah Coal Company on the coal which it mined?")

A. Yes.

By MR. BIKLE:

Q. How much did it pay per ton during the years 1902-1907 inclusive?

THE COURT: Let me understand; is that from 1902 to 1907?

MR. BIKLE: Inclusive.

THE COURT: Both inclusive, both years?

MR. BIKLE: Yes, sir.

A. Ten cents. I think there was some small amounts of 12.

Q. On what coal did you pay 12 cents? Was it during any particular period, or was it on some particular kind of coal?

A. I think it was on some particular kind of coal.

Q. And what kind?

A. I do not know. I think it was off a certain tract.

Q. Ten cents per ton was the minimum royalty on any of the coal covered by the Bulah Coal Company's operations?

A. Yes.

Q. Was that payable on every ton mined?

A. Yes.

Q. What was the rate of wages paid during the period from July, 1902, to June 30, 1907, or rather what were the rates paid to the miners?

A. That would be pretty hard to just recall, the wages at that time, period, without the records.

Q. Do you not recall, Mr. Davis, of having testified in this same case a year ago as to these rates?

A. Yes, it is in the record, but I do not just recall the wages. There were different rates.

THE COURT: Is there any objection to his referring to the memorandum? We might as well shorten it as much as we can and relieve the jury of as much labor as we can. Please just refer to that record, and if you find you are able tell us what the rates then prevailing were, let us know.

(Record of previous trial shown witness.)

THE COURT: Perhaps you can compare your figures and there will be no difference between you.

MR. MINDS: We are perfectly willing to agree that what he testified to last time shall be read into the record.

MR. BIKLE: Can we not agree, just to shorten it, that the mine rate was 62 cents for a definite period and 66 cents for another period?

MR. GLEASON: Yes.

By MR. BIKLE:

Q. So that it is a fact that the rate of pay to the miners was 62 cents per ton up to April, 1903, and thereafter it was 66 cents per ton?

A. 62 and 66, yes.

Q. And during those periods?

A. Yes.

Q. And that amount was payable on every ton actually mined?

A. Yes.

Q. Can you tell about what proportion of your coal paid that 12-cent royalty?

A. No, I cannot, but it was only a small proportion of it.

Q. Could you tell from your records, by an examination?

A. I do not know. We have it in the records. It would be quite a job to pick out. It was in little bits along through the periods.

ROY A. HATFIELD, having been duly sworn, was examined as follows:

By MR. BIKLE:

Q. What is your occupation?

A. Coal miner and shipper.

Q. How long have you been engaged in that business?

A. Since 1897; since 1901 in this district; the Clearfield District.

Q. In the general district where the Webster No. 4 mine is located?

A. The same district, that pays the same mining rates, yes.

Q. Are you familiar with the conditions that surround the production of coal?

A. Yes, sir.

Q. It has been shown by the evidence that was introduced in this case on behalf of the plaintiff that they actually mined and shipped, during what is described as the first period of the action, 110,892 tons of coal.

THE COURT: Let me inquire now, what you and Mr. Roads referred to as periods, is that a reference to the same dates that separate these two actions?

MR. BIKLE: The first period is the period outlined by the Commission as extending from July 1, 1902, to October 1, 1904.

MR. ROADS: That is right.

THE COURT: How does that compare with the division as between the different claims here?

MR. BIKLE: It is the same, your Honor.

THE COURT: That is what I wanted to get clear. I assumed it was the same. It may be important that the jury have that in mind as they go along, so that when you are referring to one period I think it would be well to designate it as such-and-such case, so that they will know what refers to one and what refers to the other.

MR. BIKLE: I shall do so, your Honor.

MR. GLEASON: In order that we may understand this plainly, your Honor, I would like the purpose of this testimony to be stated.

THE COURT: Oh, well, is it not sufficiently indicated, Mr. Gleason?

MR. GLEASON: If it is indicated by that one proposition, if it does not go any farther than that, it is sufficiently indicated; but I apprehend, your Honor, if we had a general purpose stated, we would know where we are at and would expedite it.

THE COURT: Is there any objection to stating what the purpose of this is?

MR. BIKLE: None, your Honor. We offer to prove by the witness on the stand that had the additional coal been mined which the Interstate Commerce Commission found that the plaintiff should have received cars for, in the two periods covered by their orders, the cost of producing the coal would not have been reduced to the extent which the Interstate Commerce Commission found it would have been by the amount of that increased output. The same offer made at the previous trial.

MR. GLEASON: The offer and the testimony of the witness is objected to unless it is shown that the witness is familiar with the testimony offered before the Interstate Commerce Commission, which the testimony of the witness in this case proposes to attack.

THE COURT: The objection is overruled and exception noted for the plaintiff. I understand what they are really proposing to do is to determine, assuming that there was a shortage of shipping in coal, what the amount plaintiffs would have received would have been had there been no shortage. That is substantially it, is it?

MR. BIKLE: We are not attacking the evidence before the Commission. We are attacking the findings.

THE COURT: Oh, I understand. This is introduced as bearing upon the question of what the

damage to the plaintiff was by reason of their not having made the shipments which it was found that they might have made.

MR. BIKLE: Exactly.

By MR. BIKLE:

Q. The Interstate Commerce Commission has found that during what is described as the first period of the action, that is, the period extending from July 1, 1902, to October 1, 1904, the plaintiff actually mined and shipped 110,892 tons of coal, and with the additional cars which the Commission found they should have received, they might have mined and shipped in addition 9523.68 tons. What, if any, additional cost would necessarily have been involved in mining and producing those 9523.68 tons of coal?

A. The additional cost would have been made up of the cost of the miner in digging the coal and putting it in the mine cars, for which he is paid a price that is known throughout the region. In addition to that, an additional cost would have been the royalty on the coal that was extracted per ton.

Q. Have you made a calculation as to what that would have been?

A. I presume I can use my figures, which I made myself?

Q. Will you please state what that would be?

A. The cost during that period of loading a ton of coal, as known throughout the Clearfield Region, in which these mines are located, was an average cost of 63 cents per gross ton. The royalty throughout the Clearfield Region, and particularly from the evidence of the previous witness, would be 10 cents per ton, making a total cost that could not possibly be avoided on the 9523 tons, of 73 cents per ton.

By THE COURT:

Q. You referred to it as the cost of loading. I assume that that means that the cost, the 63 cents, so far

as the wages element is concerned, includes all the labor bestowed on this up to the time that it is in the car; is that it?

A. Up to the time it is in the mine car in the mine, in the place. The miner who digs the coal and loads it in the mine car receives that price.

Q. What I want to get clear is, that when you refer to 63 cents as the cost of loading, that includes all the miner does up to the time that he loads the coal in the mine car; is that right?

A. That is correct.

By Mr. Bikle:

Q. Will you just state what that would be? Have you figured the total dollars?

A. The cost of 110,892 gross tons at the price stated, of $1.23, would be $136,397.

Q. You said $1.23. What is that figure? The figure which the Commission found it actually cost them?

A. That is the price that the Commission said that it actually cost. That was for this 110,892 tons. That is only the cost of the coal that the Commission found was shipped.

Q. At the figure that the Commission found it cost them?

A. Yes, sir. They also found that they should have shipped 9523 tons additional, for which they could not have avoided paying 73 cents a ton additional.

Q. What would that have made as a total amount additional, in dollars and cents?

A. The total amount additional would have been $143,348.79.

Q. Is not that the aggregate of the additional cost?

A. Yes, of the two.

Q. What would have been the additional cost, the aggregate in dollars? You have stated the additional cost is 73 cents per ton. Now what is that for the 9523 tons?

A. For the 9523 tons the additional cost would have been $6951.79.

Q. What would that have made as an average cost for the total tonnage, both that which was mined and shipped and the 9523 additional tons which the Commission found might have been mined and shipped?

A. That would have made the lowest possible cost for the total amount $1.19.

By Mr. Gowen:

Q. Per ton?

A. Per ton; per gross ton.

By The Court:

Q. May I get these figures? You give as your estimate, as I understand it, the minimum ton unit cost as $1.19?

A. Yes.

Q. Now that would apply on a calculation of how many tons?

A. That would apply on a calculation of 120,415 tons.

Q. Those figures, then, will give you the aggregate cost of dollars?

A. Yes, sir.

Q. Of shipping the whole amount, which, from that finding, assuming 9523 additional, should have been mined; that will give you the aggregate cost of mining and producing the total?

A. Yes, sir; a cost that could not be avoided.

Q. I understand. You fix $1.19 as the minimum cost of mining and production of that amount?

A. Yes, sir.

Q. So that the aggregate will be $1.19 multiplied by 120,415?

A. Yes, sir.

Q. Have you the figures there?

A. Yes, sir.

Q. Just give me your figures; I mean what you make the aggregate?

A. $143,348.79.

Q. That is your multiplication of those two sums, two figures?

A. Yes, sir.

By Mr. Bikle:

Q. During the second period of the controversy, which extends from October 1, 1904, to and including June 30, 1907, the Commission found that the complainants actually mined and shipped 143,000 tons, and that that cost them an average of $1.08 per ton. What would the aggregate cost of the coal actually mined and shipped be on the basis of those figures?

A. 143,000 tons at $1.08 is $154,440.

Q. Now the Commission found that the complainants during this second period might have mined and shipped an additional tonnage of 71,257.12 tons. What, if any, expenses would necessarily have been incurred in the mining and producing of that coal?

A. There would have been the cost of the average pick-mined price during that period, which was 63 cents. There would have been the royalty of 10 cents per ton; a cost of gathering and delivery of 7 cents; cost of ventilation and mine supplies 6 cents; which makes a total cost of 86 cents. Therefore the 71,257 tons, if shipped, could not have escaped a cost of $61,281.

Q. What would that make as the aggregate cost for the tonnage which actually was mined, produced and shipped, and for this additional 71,257 tons which might have been mined and shipped and then the average cost per ton?

A. The average cost per ton would have been $1, and is the lowest possible cost at which that tonnage could have been shipped.

By The Court:

Q. That would apply to what?

A. To 214,257 tons.

By Mr. Bikle:

Q. During this so-called second period, extending

from October, 1904, to June, 1907, you have included two items other than the mine rate and the royalty, which you did not include for the first period. Why did you do that?

A. Because of the fact that the increase in tonnage is 50%, which would necessitate the employment of more men, the purchasing of more rails and other mine supplies, more attention to ventilation on account of more men being underground, than it would to produce a tonnage that was only 140,000. I would like to state that, in the first period, there was no addition for gathering and delivery or for ventilation and supplies, because the tonnage is small.

By The Court:

Q. Let us see if we understand. Therefore you assumed that for that relatively small increase in tonnage, to wit 9523 tons, there would have been no calculable increase in the cost of mining and production, but where the increase is as much as a 50% increase, then, in your judgment, that would have involved an additional cost, the items of which you have given us, which together amount to 13 cents; is that the idea?

A. That is correct. With your permission I would like to explain it a little further. From my experience, the handling of 800 tons a month more, which is the amount in the first period, would probably not involve much additional expense in day labor, although you could not have loaded it in the mine cars for nothing. They would have to be paid the regular rate. With a large tonnage, which amounts to practically 6000 tons a month, additional day labor, supplies, etc., would have to be provided.

By Mr. Bikle:

Q. The Commission found, as I have stated, that during this period from June 1902, to October, 1904, the average actual cost per ton was $1.23, and that, with an additional output of 9523 tons, the average cost of

production would have been 88 cents. Have you made a calculation to show what the aggregate cost—

MR. ROADS: Objected to, because the question embodies facts not embodied in the Commission's reports or any evidence in this case.

THE COURT: Of course, to the extent to which the offer is a statement of fact and not a question, it is objectionable and will have to be put then hypothetically.

(Question withdrawn.)

Cross-examination.

By MR. GLEASON:

Q. Where do you live?

A. I live in Norristown, Pa.

Q. As the jury I presume know, that is a short distance from Philadelphia?

A. Yes. That is, my residence is there, yes.

Q. Those figures that you hold in your hand; where did you get them, Mr. Hatfield?

A. I secured them from the agreements covering the scale wages between the miners and the operators in the Clearfield District and verified those agreements by my own cost books.

Q. You do not understand my question. That statement that you hold now in your hand, the whole statement; where did you get it?

A. Made it myself, sir, from the facts.

Q. You got no knowledge from anybody else at all, no information?

A. No.

Q. Do you mean to say that every figure there is brought out of your own mind?

A. Every figure on here came out of my own mind.

Q. You got no information that is on that paper from anybody else?

A. Previous to the former trial of this case I read

over the facts in the matter. I also received the tonnages and the prices herein stated from Mr. Gowen.

Q. Oh. Now you did get certain figures—

A. I understood you to ask me how I made these calculations.

Q. There are certain figures, then, that you did get from Mr. Gowen?

A. Only the quantities.

Q. You got no prices at all from Mr. Gowen? Look at your paper.

A. Yes, the price by the Interstate Commerce Commission. However, I remembered that price, Mr. Gleason, from reading over the bills.

Q. You remembered it, but you did get it from Mr. Gowen?

A. I had it repeated to me.

Q. During the date of the first period you were not in the Clearfield Region, were you?

A. Yes, I have been in the Clearfield Region since 1901.

Q. Where had you come from to the Clearfield Region?

A. I had not operated coal mines under my own operation; I had ownership or interest in mines, with which I was familiar, previous to that.

Q. I mean, where did you live? Where was your residence previous to that?

A. Always at Norristown. In Norristown in the last 17 years, above it in the previous time.

Q. Have you ever been at the Webster No. 4?

A. You refer to the mine at Ramey?

Q. Yes.

A. I have only driven by there.

Q. You drove by on the township road?

A. Yes.

Q. Was it a shaft or a slope?

A. I was not inside of the place.

Q. That is, you do not know the kind of a working it is at all, whether it is a shaft or a slope?

A. I do not recall. If it is a slope, it may only show inside of the drift mouth.

Q. In order that the jury may understand, you do not know anything about this mine yourself, do you?

A. About this particular mine?

Q. Yes.

A. I know about the general practices throughout this region.

Q. I am asking you if you know anything about this mine yourself, of your own knowledge?

A. Not by examination of the mine.

Q. Have you ever been in it?

A. No. I said that before.

Q. You have never been in it?

A. No.

Q. You do not know how far, of your own knowledge, the face of the working is from the mouth of the shaft or slope?

A. No, I do not.

Q. You do not know anything about the difficulties under which the plaintiff labored during either the first period or the second period, of your own knowledge?

A. No, I would not know that.

Q. If a mine did not work one full day in a year by reason of the lack of cars supplied, would that increase or decrease the cost of the production of the coal?

MR. GOWEN: I do not want to object, of course, to anything that Mr. Gleason wants to ask, but they have proven, as a part of their case, by introducing the findings of the Interstate Commerce Commission to that effect, that, in the first period, we will say, there were so many tons mined at a given cost per ton. Now that is their own evidence. We have called Mr. Hatfield simply to prove—what was a matter that could not be disputed anyhow, under Mr. Davis' testimony—that the additional 9000 tons would have cost so much more to

mine, and that consequently, if that coal had been mined, the aggregate cost of producing all of the coal, as well that mined as well as that which the Commission said ought to have been mined, would have been so much a ton. Now Mr. Hatfield has not undertaken to say nor to deal at all—we did not ask him to—with the question of the cost of mining the coal there which was produced. The Commission has found that and the plaintiffs have proven that as part of their case by putting in the finding of fact. Now we had precisely this same question in the former trial, when Mr. Connor was on the stand, and your Honor then ruled out all these questions, upon the ground that Mr. Connor was not testifying as to whether that was a reasonable cost, the cost which the Commission had found—had not anything to do with it.

THE COURT: If I catch the theory of the cross-examination, it is not directed to that feature of it at all, Mr. Gowen, but to the estimate which this witness puts upon what would have been the cost of the additional tonnage had it been mined.

(Objection withdrawn.)

At 12:45 a recess was taken until 1:30 p. m.

1:30 p. m.

Roy A. Hatfield, cross-examination resumed.

By MR. GLEASON:

Q. Did Mr. Gowen tell you, in the making of this estimate, that this mine had worked irregularly? Did Mr. Gowen give you any information, to go with this information, that Webster No. 4 had worked very irregularly, because of the car shortage?

MR. BIKLE: We object to the form in which

that is asked. It is entirely permissible to inquire whether he told him the conditions of mining at that time, but to suggest what is not in the record as to conditions we think is not permissible.

MR. GLEASON: It is absolutely in the record —not in this record, but it is in the record of the Commission.

THE COURT: The objection has this basis, that it at least implies a statement of fact. That is substantially the objection.

MR. GLEASON: Your Honor, why should we not bring before this jury the conditions—

THE COURT: That is not the point, your bringing them before the jury, but the manner in which you are bringing them. You must bring them before the jury by asking a question and having the question answered. That is the objection —not distinguishing between what is a statement by counsel and what is a question.

MR. GLEASON: This is an absolutely hypothetical basis, so far as this witness is concerned, and we have a right to inquire into the elements by which he arrived at his conclusion.

THE COURT: You have the right to inquire, that is unquestioned, and inquire in your own way and frame your questions according to your own judgment; but the inquiry must be an inquiry, and counsel under the guise of inquiring cannot make statements, or under the guise of cross-examining cannot testify. That is the point of the objection.

(Question read.)

MR. BIKLE: The objection is made because there is no proper foundation for that question.

THE COURT: In so far as it is a question it is admissible, and put in the question form it is,

whether Mr. Gowen told you that fact or made any statement to that effect.

A. Mr. Gowen stated to me the conditions as I have previously stated them.

By Mr. Gleason:

Q. He stated what?

A. To me the conditions as I have previously stated them.

Q. Did he state that this mine had been working irregularly on account of shortage of cars?

A. I think when I read the bill before the Interstate Commerce Commission that that was alleged.

Q. It was alleged; and then you did read about that, did you?

A. My recollection is that I did.

Q. Did you read the testimony?

A. It is so long ago, Mr. Gleason; I read I think everything at that time. It has been so long I cannot tell you much about it.

Q. What is your recollection? Did you read the testimony?

A. I think I read it, but I do not think I could tell you much about it, because it has been a good while ago.

Q. Do you remember reading in the testimony, and as bearing on this estimate of yours, that in 1902—

Mr. Bikle: This is objected to. This is an effort to import into this record what is an entirely different record through a pretense of a question.

The Court: Your questions must be questions and not statements by counsel in the guise of questions.

Q. In the reading of that testimony, and as bearing upon your calculation here, did you read in the testimony that the mine in 1902 did not work one full day?

A. I do not remember.

Q. So that did not enter into your calculation?

A. No.

Q. Did the question of car shortage enter into this calculation at all?

A. That question cannot be properly answered the way you put it.

Q. Why?

A. As I understand it the 9523 tons would have made up all the cars you should have received. Is that correct?

Q. That is what you have said?

A. And if that had been mined, you would have had to pay 73 cents a ton for mining it.

Q. That is what you said. I ask you again, in this estimate that you made up on this paper you have in your hand, did you take into consideration the question of the shortage of car supply?

A. I did, provided the Interstate Commerce Commission took this 9523 tons as an estimate of shortage of car supply.

Q. Then if the Interstate Commerce Commission took that into consideration, so did you, is that right?

A. If that represents that amount, then I did, based only on the Interstate Commerce Commission.

Q. Then your figures—

A. I have no knowledge of your shortage of cars.

Q. Then your figures and the Interstate Commerce Commission figures agree?

A. I presume they do, as to the calculation I made.

Q. And you would dispute then the fact that this coal should have been produced there at 88 cents, providing there had been no discrimination found in the car supply?

A. I cannot answer that question.

Q. You cannot answer that question; do you dispute it?

A. I do not see how it could be mined for 88 cents.

Q. You do not see how it could be mined for 88 cents; you mean that is a low figure?

A. I mean if you had mined the coal that the Interstate Commerce Commission said you should have received cars for together with what you did mine at the cost established in the Interstate Commerce Commission report, it would have cost you $1.19 to mine the whole.

Q. Don't you know that you took this figure that you started out with, $1.23, from Mr. Gowen as a finding of the Interstate Commerce Commission?

A. I know that the Interstate Commerce Commission found $1.23, which I have not questioned or taken into consideration, whether it is right or wrong.

Q. You know that of your own positive knowledge?

A. I remember that figure in reading over the report.

Q. What report did you read?

MR. BIKLE: That is in evidence in this case.

THE WITNESS: I read it in the printed books. I do not know whether two or three sets of printed books or how many sets were gotten up.

Q. That is where you got that?

A. I remember that figure from the printed books.

Q. You just take that as a figure from the printed book?

A. I took it as I presume that the Interstate Commerce Commission decided that that was the figure.

Q. Of what?

A. Of the cost of the coal that you did mine and ship.

Q. Did you not take the other figure also from the Interstate Commerce Commission report; where did you get your 88?

A. You mean the 73 cents?

Q. Where did you get your 88?

A. I did not get any 88. You asked me about 88 cents.

Q. Did you read that in the report?

A. I am not certain, but I think I did.

Q. To get it to your attention a little more fully, did you read in the report the Interstate Commerce Commission found that if there had not been discrimination in car supply, that we could have mined and produced coal and shipped our allotment at a cost of 88 cents a ton?

A. I do not remember the exact figure.

Q. You remember of some figures?

A. Yes, but I cannot tell you what they are.

Q. If it is 88 cents, will you dispute it under the conditions that were laid before the Interstate Commerce Commission?

A. I do not understand that I am here to dispute any question that has been settled already.

Q. You were not here to testify as to any question that is found by the Interstate Commerce Commission, is that your understanding?

A. I understand that is the case, except as to what would have been the cost of the coal if you had received the cars for this additional tonnage.

Q. If then, the Interstate Commerce Commission has found as a fact that we could have mined, had we been given our allotted share of the cars in the Clearfield Region, and no discrimination had been practiced against us, and if they found as a fact that we could have mined and produced that coal at 88 cents a ton, do you dispute that?

A. I have not figured it up on that basis.

Q. This is an entirely different basis from what the Commission figured?

A. I presume so, I don't know.

THE COURT: Let me understand. You are asking him as to a cost price of 88 cents as the figure at which this coal might have been produced had the full quota of cars been supplied. Is that figured on the basis that the actual quantity of coal which you did mine, plus the 9523, or that

much more, had been mined, could have been mined at a unit ton cost of 88 cents, is that what your question meant?

MR. GLEASON: Yes.

THE COURT: Is not that the same unit cost which Mr. Hatfield gives us at $1.19?

MR. BIKLE: Yes.

MR. GLEASON: Absolutely no.

THE COURT: It certainly is, if your question meant what I understand you now to say it did mean. Let me put it again, and see whether we understand each other. You were speaking about a unit ton cost of 88 cents?

MR. GLEASON: 88 cents as found by the Commission.

THE COURT: If you had received your full quota of cars, received all you were entitled to at the full amount which you then would have mined, that you would have mined it at a cost of 88 cents?

MR. GLEASON: Yes.

THE COURT: What you would have mined was what you actually did mine plus 9523 tons, was it not?

MR. GLEASON: Yes.

THE COURT: What actually was mined, plus 9523 more tons, is what Mr. Hatfield says in his judgment would have cost $1.19 a ton to have mined and produced?

MR. GLEASON: Yes.

THE COURT: Then put the question that way to Mr. Hatfield.

MR. GLEASON: I am asking him if he disputes, having read the testimony, that the statement or finding of the Interstate Commerce Commission—

THE COURT: The witness is not here to dispute anything. He is here to testify to facts within his knowledge.

MR. GLEASON: Then we have a perfect right to get that before the jury.

THE COURT: Certainly. You can ask him whether or not his judgment is such and such, providing you make it clear tc what shipping problem the 88 cents cost pertains. As I understand Mr. Hatfield, he does not know whether there was any shortage of cars or not. He does not know whether you would have shipped that 9500 more tons had you been supplied with more cars or whether you would not, and he has given a statement that if you had shipped 9523 tons more than you did ship, the figures of which are also given, then in his judgment, what would it have cost to have mined and produced it, and he has given us his figures, which I understand to be $1.19. Is that correct?

THE WITNESS: Yes, but I have not that data at hand on which the Commission bases—

By MR. GLEASON:

Q. Is not the cost of coal, the production of coal, a variable figure, depending on a great many circumstances, such as irregularity of car supply, labor troubles, shortage of car supply; is it not a variable figure?

A. Somewhat variable, but not as to the pick mine rate. That is a fixed rate, fixed price.

Q. The mine rate per ton and the royalty, that is substantially fixed?

A. Yes.

Q. But are not the other elements entering into the cost of production of coal by the ton variable elements, depending largely upon circumstances?

A. To some extent.

Q. If in a car supply, your cars would be shipped

into the mine at 9 or 10 o'clock, and then have to hold your men, your day men, idle, would that not affect the price of the cost of a ton of coal, if the cars intended for you were not put into operation until 9 or 10 o'clock in the morning, your day men's time running from the time they came to the mines, would that not increase the cost per ton of coal in its production?

A. It might, probably would.

Q. Would it not as a fact; is there a question about that?

A. I think there is no question but what it would increase.

Q. And would it not increase it decidedly?

A. You mean for that day?

Q. Yes.

A. Yes, for that particular day.

Q. Every time that would occur, would it not be an added increase in the cost of the production of each ton of coal?

A. Yes, provided that very extreme condition you state would occur.

By The Court:

Q. As I understand what that means is this, if you are having men idle, that adds to the unit cost of the work they do?

A. For the whole day.

Q. For the whole time?

A. Yes.

By Mr. Gleason:

Q. When you estimated your lowest cost of the production of a ton of coal in these two periods, you discriminated some and had more items in your cost production in the last period than you had in the first, is that correct?

A. Yes.

Q. You, for instance, said that the ventilation I think you added?

A. I added supplies to that.

Q. You mean to say as a coal expert that you do not need ventilation during the first period?

A. No, I think not; I would not say that.

Q. That is you need ventilation when there are men working in the mines?

A. But you already have it under the tonnage, a slight increase in tonnage would not add any to your cost of ventilation in my judgment.

Q. You said that the pick rate was 62 cents?

A. Yes.

Q. And you added 10 cents?

A. In which period?

Q. The first period?

A. I said the pick mine rate was 63 cents.

Q. And you added 10 cents for royalty, making 73?

A. Yes.

Q. Did the mine need ventilation, any air at that time at all?

A. I think the tonnage you were producing would provide all the ventilation there would be needed. For this additional small tonnage, it was only 9523 tons.

Q. You have added nothing for ventilation in there?

A. My judgment is that the day men that would be employed to get out a large tonnage such as 110,892 tons, would provide all the ventilation needed to get out the small additional amount. In other words, you will not need any more day men. If you think you do, that is another matter.

Q. If I was a mine owner and thought I did, I would be correct?

A. But I have given you the benefit of the doubt.

Q. You have given me the benefit of a doubt on a mine you drove by and never saw?

A. Driven by and never been in it. Mines generally are pretty much alike in the Clearfield Region.

Q. They are all pretty well alike?

A. Yes.

Q. You mean to say—

A. I mean to say that the operation of the men working is pretty much the same.

Q. Were you ever concerned in the mine of Rainey?

A. No.

Q. Were you ever in the mine at Hoffsdale?

A. No.

Q. At Osceola?

A. No.

Q. You were concerned in a mine in Coalport, were you not?

A. Yes.

Q. That was a different vein of coal?

A. I do not know. I think it was.

Q. And you have not had a mine—

A. I imagine the heart of the coal was pretty much the same.

Q. That is imagination on your part. Are you going to swear to it?

A. I do not know for certain.

Q. Will you swear that the height of vein in your Coalport mine was nearly as high as the height in the Minds mine?

A. I will not, because of the fact that I only know of the height in the mines that are operated by Mr. Minds by report. I do not know of them of my own knowledge. Otherwise I would.

Q. If you know of your own knowledge you would, but you do not know of your own knowledge and you cannot?

A. I only know because I am told so, by reputation.

Q. Were you ever concerned in a mine up there that worked the same vein as Webster No. 4 in Coalport?

A. I am not sure whether we worked the D vein or the B vein at Rainey.

Q. You do not know whether you were interested in the same mine or worked the same mine?

A. I was not interested in any mine that worked the same vein.

MR. BIKLE: We offer in evidence an exhibit offered by these complainants before the Interstate Commerce Commission in these proceedings and duly certified by the Interstate Commerce Commission, being an exhibit showing distribution in the Tyrone division.

MR. GLEASON: We object to the offer of any detached part of the record from the Interstate Commerce Commission in this case, and we object to the particular sheet in question for the reason that there was considerable testimony with reference to the sheet offered before the Commission, and as embodied in the entire record of the Interstate Commerce Commission; thirdly, that the offer is an unfair offer for the reason that a garbled part of the report of the Commission is purported to be introduced here for the purpose of discrediting the finding of the Commission and forms no intelligent basis for the consideration of any criticism of the Commission at the hands of this jury.

MR. BIKLE: If the Court please, we think this is relevant for several reasons—

THE COURT: The only basis upon which it is evidential is that it is a declaration by the parties in interest?

MR. BIKLE: That is it, and it is admitted by the other side.

THE COURT: It is admitted on that ground.

Exception noted for plaintiffs by direction of the Court.

EDMUND C. HALEY, sworn.

By MR. BIKLE:

Q. You are in the employ of the Pennsylvania Railroad Company?

A. Yes.

Q. And have been for how long?

A. Thirty years.

Q. In what capacity?

A. As a clerk in the office of the General Superintendent of Transportation.

Q. What does your position involve in the way of duties, with respect to distribution of cars, anything?

A. I have charge of the rating of bituminous coal mines and keeping the record of distribution of cars.

Q. It is actually part of your duties to keep the records of that distribution?

A. To file the records of distribution, yes.

Q. Do you have here in court the records of the distribution of cars on the Tyrone Division of the Pennsylvania Railroad for the years from October, 1904, to June 30th, 1907, inclusive?

A. Inclusive, yes.

Q. Are you familiar with the defendant's exhibit No. 1, a blue print?

A. Yes, I have seen that.

Q. Do you know from what that blue print was prepared?

A. Yes.

MR. GLEASON: We forego the right of cross-examination of the witness on this point just at this time.

By MR. BIKLE:

Q. From what was this prepared?

MR. GLEASON: The question is objected to as incompetent, irrelevant and immaterial, and we desire the defendant to state the purpose.

MR. BIKLE: We are going to lead to the offer of the distribution sheets, the railroad company's distribution sheets, showing the distribution of the cars in this region, for the purpose of showing that in its determination of the additional tonnage

which the plaintiff might have mined and shipped, the Commission has made a mistake in calculating the number of cars which it should receive.

THE COURT: You would have to show that independently. The only evidentiary principle upon which this is admitted is that it is a declaration, a statement of fact, by a party in interest. They have made that statement. Supposing they did get it from some books of yours, that would not make your own statements evidential.

MR. BIKLE: We desire to introduce those sheets as substantive evidence of the cars available for distribution.

THE COURT: You will have to establish their evidentiary character independently of this.

MR. BIKLE: But they themselves have, by their presentation of a blue print in this proceeding, admitted—

THE COURT: Supposing they got some information from you, a statement or a book. Of course there is no fact—it is purely for the purposes of illustration, and on the basis of that, they made a statement. Having made the statement, why of course that is evidential against them, but supposing it was mistaken, it would not make a record from which they got it, evidence.

MR. BIKLE: I think it will authenticate it. We submit certain genuine documents—

THE COURT: The document is in evidence, and whatever they admitted, it becomes evidence. If they were led into a mistake, they can explain that fact.

MR. BIKLE: I think so, but I thought that *prima facie* this constitutes not merely an admission, as it is tabulated, but it constitutes an admission of the genuineness of the documents from

which it is compiled. They cannot come in here and dispute the authenticity of documents that they have offered in this proceeding.

THE COURT: Whatever admissions they made, they are evidence against them and are to be taken until we hear something else. They are to be taken as a fact, because when a man tells us something we take it for granted he is telling us the truth. If he is mistaken, misled in what he said, then he can explain that.

MR. BIKLE: But your Honor, this is a tabulation in lieu of the sheets. This is for convenient reference. They are in evidence.

THE COURT: Supposing the tabulation is incorrect. The tabulation of things they wrote down is evidence against them. Why? Because they wrote them down, but that does not make anybody else's writing down evidential. I cannot see on what principle it does.

By MR. BIKLE:

Q. You have in court the original sheets that are in your file in your office?

A. Yes.

Q. Covering the period from October, 1904, to June, 1907, inclusive?

A. Yes.

Q. Are they the official sheets of the company?

A. Yes.

MR. GLEASON: Please state your purpose.

MR. BIKLE: For the purpose of authenticating these sheets, in order to offer them in evidence.

THE COURT: That is to say, it is your purpose to show the number of cars which were supplied and the facts upon which the proper quota of cars could be determined by a calculation?

MR. BIKLE: Yes. It is the same evidence which was admitted at the other trial, precisely.

MR. GLEASON: That I should absolutely object to. It is not admitted in the same manner at all.

THE COURT: We are not up to the question of the sheets yet, but we are on the question of what the objection is to their proving—and that is one of the things this jury wants to know the data upon which the damages are to be calculated. How can you determine the data unless you know the car shortage, and how can you know the car shortage unless you know the facts from which the car shortage can be determined?

MR. ROADS: Our desire was to get the offer from the defendants and then object to it.

THE COURT: What they propose to show is now the record of the cars furnished, the cars which were actually furnished, for the purpose of having determined the data upon which the judgment of this jury will proceed, as to how many they should have supplied to your minds.

MR. ROADS: We object to that testimony if it goes to impair this sheet, which was offered in evidence and is part of the record upon which the Interstate Commerce Commission based its finding. The sheet was prepared at the instance of the Commission, by comparison, and submitted to counsel on both sides, and admitted in evidence and comes from the books of the defendant company. The point we make is that they cannot attack that sheet on the ground that they are estopped after having made up the sheet that was prepared and sent in and submitted to the Commission. They cannot now put this witness upon the stand and show something—

THE COURT: Are we not approaching it from

the wrong angle? We are not attacking anything or anybody. We are trying to find out certain facts, and we are trying to find out what the truth is. The fact that somebody else has made a similar investigation—whatever they thought they found they thought they found, but what we think we find, we are going to think we find.

MR. ROADS: We have no contention against that. Our contention lies in this point, that they ought not to be permitted on the ground of estoppel, to offer in evidence before this court and jury anything that would contradict this sheet, because it would be unfair to the Commission who made this award upon which we stand; and secondly—

THE COURT: What interest have the Commission in it? They have no more interest in it than this jury or I have.

MR. ROADS: It affects us through the award by offering this at this time, and your Honor will catch my meaning when I say that we have no objection to this witness testifying from this sheet any deductions he may choose to make, but if he undertakes to show anything different than is on this sheet that has just now been offered by the defendant, we object to that as they are being estopped, on the ground of estoppel.

THE COURT: If I have caught the theory of your case, it is, first, that you were entitled first to a certain number of cars; that you did not get all you were entitled to; that by reason of that you could not ship, and therefore could not sell as much coal as you had otherwise shipped and sold, and that your second damage is the loss in what you would have made on that coal had you shipped.

The first thing this jury will have to know is how many cars were you short? How many tons would those cars have carried? What would it have

cost to have shipped that coal, and how much would you have received for it if you had shipped it? Given that data, they will figure out the amount of damages.

MR. ROADS: That is all in the findings of the Commission.

THE COURT: As I understand, what they are proposing to show by this witness is the facts from which the extent of the car shortage can be determined. Is that correct?

MR. BIKLE: That is right.

THE COURT: What is your objection to showing that?

MR. ROADS: On the ground that they cannot be summoned before the tribunal to determine and offer any such—

THE COURT: Is that an administrative question? If it is, we are concluded by the finding of the Interstate Commerce Commission. If it is a question of fact the people of the United States have said that juries are to find facts, and not Commissions or lawyers or judges or anybody else, but juries, and that is what this jury is for, to find the facts, and that is one of them.

MR. ROADS: Is it not an administrative fact?

THE COURT: If this is an administrative finding, it is just as much the law of this case as if it was written into an act of Congress, and we take it because it is the law. It is not the fact, it is the law, but how the number of cars that were furnished to you can be said to be an administrative question, I do not quite grasp.

MR. ROADS: I do not know what the purpose is, whether it is to affect the damages alone, or whether it is to affect the discrimination.

THE COURT: You asked them to state what they propose to prove. They have stated what they propose to prove is what the real shortage in your cars was, if any. For instance, supposing they were able to establish to the satisfaction of everybody that there had been no car shortage at all. You would not have any claim for damages against them, would you?

MR. ROADS: Whether the jury believed the Interstate Commerce Commission finding or not, the findings of the Interstate Commerce Commission are here fixed in this case. Then if they could show to the satisfaction of the jury—

THE COURT: Do you understand that the finding of the Interstate Commerce Commission on facts concludes anybody? It is merely *prima facie.*

MR. ROADS: Merely *prima facie.*

THE COURT: It merely relieves you of the necessity of proving the thing over again. You have done that.

MR. ROADS: Yes.

THE COURT: We take that as *prima facie* evidence. That is to say, that is true until we are convinced that it is not true. That is what they are proposing to do.

MR. ROADS: We have no fault with that at all. The point I am making is this. I think, if the Court please, and I submit, that the rule of law applies here in regard to these sheets just exactly as it applies in any suit or any other question where a man is estopped from making any contention on the thing which he has done. If he makes a representation in the course of the matter, that is pertinent.

THE COURT: I understand it is your compilation.

MR. ROADS: It is a compilation offered in evidence by agreement of counsel from their own books. The question is, are they to be permitted to undermine this?

THE COURT: Is it not your compilation?

MR. GLEASON: No.

MR. BIKLE: It is, so certified.

THE COURT: If it is not, it is admitted on the wrong statement of fact. I asked for that statement, and it was admitted as your declaration of a fact, and because it is your declaration of fact, evidence against you. Notwithstanding you said it, it might not have been true. You might have made a mistake. You might have gathered it from sources that were not reliable. Because you said it, it is evidence against you, and because you said it we can believe that it is true until you or someone explains wherein it is not true. You may have said something that was inaccurate. We all do.

MR. ROADS: No, we stand by the sheet, but did your Honor catch the remark that I made, the statement I made, as to how this paper was prepared?

THE COURT: Yes, I caught the remark, but I caught it as a remark. There is not anything yet in evidence that shows me how it was made.

MR. ROADS: It was made in this way, at the suggestion of the Examiner representing the Interstate Commerce Commission. It was stated that both sides get together in the office of the Pennsylvania Railroad Company in Philadelphia and from their records compile a statement of car distribution, and the original of this is the result of that suggestion, offered in evidence and received in evidence and acted upon by the Interstate Commerce Commission. The doctrine of estoppel should apply to them provided they attempt to undermine that sheet.

THE COURT: If they agree to something, they are of course bound by their agreement.

MR. ROADS: That is it.

THE COURT: If they agree to something you will have to produce evidence of the agreement. I cannot assume they have agreed to something.

MR. GOWEN: I have no doubt Mr. Roads believes what he is saying is the truth. What we agreed to do was this: The Examiner of the Commission asked—we submitted our distribution sheets to these gentlemen in order that they might prepare a statement from them. That was a fair request. We had not a thing to do with the tabulation of those figures. They were made by their own people and we did not take any part in it at all.

MR. MOORE: You furnished the distribution sheets for our men to make that?

MR. GOWEN: Yes.

MR. MOORE: We furnished you a copy of that blue print in advance of the arguments before the Interstate Commerce Commission.

MR. GOWEN: Yes.

MR. MOORE: You never raised any objection; it was argued on that blue print?

MR. GOWEN: It was argued, but the argument distinctly questioned the accuracy of your figures.

MR. MOORE: You questioned that blue print?

MR. GOWEN: Oh, yes.

MR. MOORE: Does the record show that?

MR. GOWEN: We certainly did it.

By MR. BIKLE:

Q. These distribution sheets are the official copies of the distribution sheets on file in your office?

A. Yes.
Q. The originals?
A. Yes.
Q. What do they show?

Objected to.

THE COURT: You can show the purpose for which they are kept, of course.

Q. For what purpose are they kept?
A. For the purpose of making a record showing the cars placed in each mine in the Tyrone region.
Q. Are they for the purpose of showing the distribution generally in the region?
A. Yes.

MR. BIKLE: We offer those in evidence.

THE COURT: The witness is subject to cross-examination.

Q. These sheets are sealed?
A. Yes.
Q. When was that done?
A. I think it was about last April.
Q. What was the occasion for sealing them?
A. We had a firm of accountants take off some additional information and when they were through the chief said, "Seal them", so we would have no further access to them.
Q. So they have remained sealed ever since?
A. Yes, the accountants examined them this morning.

By MR. GLEASON:

Q. When were they examined?
A. By these accountants?
Q. Yes.
A. Somewhere between February and May this year.
Q. Where?
A. In the office of these accountants, in the Commercial Trust Building.

Q. So they were taken from your office?

A. Yes.

Q. Where is your office?

A. On the third floor, Broad Street Station.

Q. And they were taken to the office of a trust company, office of accountants?

A. Yes.

Q. Where is that office?

A. That is on the 12th floor of the Commercial Trust Company.

Q. What city?

A. Philadelphia.

Q. How long did they remain with those accountants?

A. I cannot tell you just the exact period; somewhere—anywhere from one week to four.

Q. These were sealed then by the accountants?

A. Yes.

Q. And they were brought back to you?

A. Yes.

Q. You did not know what is in them?

A. They were brought back to us. We tied them up.

Q. I am asking you if you are willing to swear what is in these papers?

A. Yes.

Q. Have you opened them?

A. The accountants brought them back in a loose state, and we tied them up in their presence and they sealed them in our presence.

Q. The accountants brought these back in a loose shape?

A. Yes.

Q. And then you put them together?

A. Yes, put them in these bundles, yes.

Q. And you sealed them up?

A. Yes, sealed them.

Q. Did you examine to see whether there had been any changes made by the accountants?

A. We did not examine each individual sheet. We saw that the months were there.

Q. And made no particular examination except that at all?

A. Not as to the sheets, no.

MR. GLEASON: We object to the introduction in evidence of the sheets.

By MR. GLEASON:

Q. Where did you get the information from which these sheets were compiled?

A. Those sheets are made by the car distributor in the region.

Q. They were not made out by you at all?

A. No.

Q. Where does he get his information?

A. He gets his information from reports made by train conductors, placing the cars to different mines.

Q. These different train conductors on the different divisions, make their report of the cars to what source?

A. They make it to the trainmaster.

Q. To whom does the trainmaster make his report?

A. The car distributor mostly works in the trainmaster's office.

Q. And he makes his report to the car distributor, does he?

A. Yes, that information is turned over to him.

Q. And then that report is made to you?

A. Yes.

Q. It passes through four or five hands before you get it?

A. After the car distributor makes it out, he sends it direct to our office.

Q. Where are the records from which these were compiled, the original records?

A. You mean the train conductor's reports?

Q. Yes, and the trainmaster's report, and the car distributor's report, where are they?

A. They would be on the Tyrone Division, in the local office.

Q. They could be produced here?

A. Yes.

MR. GLEASON: We object to the offer of the distribution sheets as not being the best evidence and the original foundation, and merely depending for identification by the witness upon the stand, as hearsay testimony absolutely, not the best evidence in the case.

THE COURT: Do you want to develop the facts a little more clearly? I understand the basis of that objection is that they are not the original entry, that they are the ledger entries of the books of original entry.

MR. BIKLE: It is the only practicable way of course to show the data.

THE COURT: You show that and dispose of it as a practicable question.

By MR. BIKLE:

Q. These reports that you have alluded to, by which these sheets are made up, about how many would there be in a day for example coming into the car distributor from this division?

A. A train would serve probably 20 mines. There are about 140 mines on the sheet.

Q. These reports from each train are sent where?

A. To the trainmaster.

Q. What do they show, each one, what information is contained on them?

A. They show how many cars are set forth at each mine.

Q. What does the trainmaster do with that report?

A. He turns it over to his car distributor.

Q. Is that the basis on which these sheets are made?

A. Yes.

Q. If you had all those trainmaster's reports, would they show an intelligible statement of the distribution?

A. No, sir; they would have to be worked out on a sheet, just like that, in order to get a true idea of the distribution in the region; you would have to boil it down to a whole some way or other.

By THE COURT:

Q. What is done with them when they come in; these sheets are really tabulated then as I understand; what has become of them, are they kept?

A. They are kept for a certain length of time. I don't know how long.

Q. How about those as far back as 1902, 14 years ago; are they kept?

A. I think the I. C. C. only refers that they keep them 7 or 8 years.

Q. What I want to know is the fact, can they be produced?

A. I couldn't tell you.

THE COURT: I suppose that that is insisted upon as the basis of objection. I will give you an opportunity to show whether they can be produced or not.

MR. BIKLE: I was considering whether to make a formal offer of the sheets as they are linked up with this blue print, so as to get the exception on the record.

MR. MINDS: If your Honor please, we are perfectly willing to let them offer this thing in evidence if they will offer the record of the whole case before the Interstate Commerce Commission. We object to sending in a little piecemeal of the case—

THE COURT: What difference does it make whether they offer it or whether you offer it? We

are trying this case absolute *de novo*. This jury is trying it just as if the same case had been previously before another jury. That jury would have disposed of it to the best of their judgment and ability, and this jury will dispose of it to the best of its judgment and ability, and it is not attacking anybody.

MR. MINDS: They come here and present a piece of paper out of a record that has probably five hundred pieces of paper.

THE COURT: If there is any part of this record that is an integral part of the statement submitted of the record, it would have to go in. They cannot offer half of what you said, but of course they must offer the whole of it; but if you said some one thing at one time and something else about another thing at another time, they can offer all you said about the one thing without being called on to offer all you said about other things. But they cannot offer a part of a thing which they are offering. They must offer the whole of that, just the same as if it were any statement you made. They could not offer a part of a statement you made without offering the whole statement; but if you made a statement on one subject and a statement on another subject, they could offer one without offering the other.

MR. BIKLE: We have no objection to the whole record going in evidence, but there is nothing in it that we want to exclude except that.

THE COURT: Suppose you stipulate then this, that either of you may offer any part of that record which you choose to offer without objection.

MR. BIKLE: And that is on a statement of counsel on the other side that these sheets are accepted without going beyond what has been done.

MR. MINDS: They have the record to produce, I believe?

MR. BIKLE: Yes, we have it here, certified.

THE COURT: You make this offer and make the stipulation upon which they refrain from objecting to it.

MR. GLEASON: Our objection is withdrawn with the understanding of course that either side is at liberty to introduce the whole record or any part of it without objection.

THE COURT: Let it be admitted on that condition.

MR. GLEASON: The objection to the document offered in evidence as not being the original, but a copy, is withdrawn. Our objection to the admissibility of the sheets themselves as being distribution sheets is withdrawn. We maintain that part of the objection as against their use of these distribution sheets to attack the blue print in question. In other words we take this as their declaration before the Commission, and while your Honor said that this was *de novo*, your Honor did not surely mean that we could get an increased amount over the award the Commission gave us. Our status is fixed by the award of this Commission. We come in here under that award. We cannot make any attempt in this court to get a dollar more, no matter what our claim was before the Commission. We cannot make any attempt before this court to get a dollar more than the award which the Interstate Commerce Commission gives us.

THE COURT: The reason of that is your suit is on the order.

MR. GLEASON: It is on the order,, and it is the only thing we could do. If our position is fixed in

that way, there is surely some limitation to their offer of evidence to contradict testimony that was offered before that Interstate Commerce Commission. They had their day in court. They had more than one day in court. This sheet was produced by them and they allowed this Commission to go on, make all its calculations, make its award, upon that paper that was furnished from their record, and now we are bound by the findings of that Commission. Does not the doctrine of estoppel apply somewhere?

THE COURT: I am afraid I do not quite grasp that phrase as applied to this. As to the estoppel proposition, it would seem it would really mean that the finding was conclusive.

MR. GLEASON: No, your Honor, but we are bound by the finding of the Commission, are we not, in this case? Absolutely. We cannot get one cent more.

THE COURT: I do not think you are bound by it, but your claim is based on it. In that sense you may say you are bound by it, but you—

MR. GLEASON: As we stand here today we are bound by it.

THE COURT: You are bound by it in the sense in which your house cannot very safely be bigger than your foundation.

MR. GLEASON: If a certain item of evidence was introduced before that Commission from their books and plainly indicating what their books show, can it be possible they can introduce a witness here now to show something that their own books did not show?

THE COURT: Supposing they had called a witness who would testify to a certain state of

facts, testify with perfect truthfulness as far as his intentions to tell the truth are concerned, and in perfect good faith. Now on the basis of that the Commission makes an award, as they naturally would, basing their award on a finding which in turn was based on that testimony. The case comes to be resubmitted to a jury, and it turns out as a fact that that witness made a mistake and the fact was not as he testified to. He might be willing to take the stand himself and frankly acknowledge that he was in error, that he had failed to remember, or he had remembered wrongly, and he wanted to correct it. Is it your position that these people would be what you call estopped and could not show what the real truth was?

Mr. Gleason: Not in that particular instance which your Honor cites.

The Court: What is the difference between the witness taking the stand and saying it and the blue print showing it?

Mr. Gleason: We have got to introduce the findings of the Commission as our basis for recovery in this Court. We are bound absolutely by these findings and we have introduced them.

The Court: More than that, they are made evidence in your favor from which the jury can find.

Mr. Gleason: They are from the books of the Pennsylvania Railroad Company absolutely, and now that we are bound by that finding before that Commission, that they can come in here, and having had two opportunities before the Interstate Commerce Commission to develop this same matter, that they can start it in here now *de novo*, considering now that we are bound by the finding of that Commission, does not appear to us to be justice, it does not appear to us to be right.

THE COURT: It is not a question of what it should be, because neither the jury nor I wrote this Act of Congress, but it is, what is in the Act of Congress? What I understood was that you were in Court on the proposition that the jury was to determine the amount. The amount as found in your favor is evidence, offered in evidence. The jury can find that to be the amount—

MR. GLEASON: That is presumed to be the correct amount. We are bound by it.

THE COURT (reading): "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the finding and order of the Commission shall be prima facie evidence of the facts therein stated," except that you may in addition to your damages recover certain special costs.

It seems to me that is perfectly plain and can have but one meaning.

MR. BIKLE: I think Mr. Gleason is stretching this blue print far beyond what appears on it. For instance, if, as your Honor has stated, there is a patent mathematical error, this Court is not going to accept that; on this blue print, of which they doubtless have a copy, there is shown for the quarter ending September 1906, that their rating was 832 cars and that they received 480, and yet they show that their percentage of distribution was only 23.4. Of course 480 is more than half of 832.

THE COURT: I do not understand that to be the basis of Mr. Gleason's objection. His basis is that he starts off with a proposition that if the Commission had allowed them only half of their claim they could not have shown that they were entitled to more and received the full amount of

the claim; ergo, they are bound by it, and if they are bound by it you are bound by it—

MR. GLEASON: Not altogether.

MR. BIKLE: The further thing is that this blue print does not even purport to show what would be the cars properly allottable under the Commission's rule of distribution. When this case was pending before the Commission one of the disputes was, What was to be the proper rule of distribution? This blue print does not even purport to show what the mine here in question was entitled to under the Commission's rule of distribution, and of course what we have to consider in this case is, What cars would these people have had, not on the rule we had in effect, not on the rule these plaintiffs might contend for, but on the rule the Commission found, and that was the administrative feature, and this blue print does not purport to cover that fact. I think your Honor is perfectly right, that we are trying a question of shortage of cars based on discrimination. There are certain findings which have enabled these gentlemen to make out a prima facie case, but it is a question whether they are correct.

MR. GLEASON: On the administrative feature the Commission found of course—I think that is conceded in this case—that the policy of car distribution, with their assigned and unassigned cars, was unjust and discriminatory. I do not believe they will try to get away from that. The Commission did find that substantially as an administrative feature, but we contend that they have offered certain evidence here, and they joined in the offer of certain evidence, taken from their books. The matter which was reduced to that paper is exclusively in their possession, and we have to go to their books and find it, and to come in to Court

and say that is a replica, a copy of our book, and not after having deceived the Commission, they propose to come in here with the sheets—

MR. BIKLE: That is not true.

MR. GLEASON: That is the way it looks—they propose to come in here with the distribution sheets from that region and throw into this case something they did not submit to the Commission, upon a record made from their books, and supplemented by the testimony of a witness.

THE COURT: Was not this blue print you speak of offered by you, and did you not gather the information from which that compilation was made from the distribution sheets that they supplied?

MR. GLEASON: It is a joint offer.

MR. BIKLE: That is not what the certificate of the Commission says.

MR. GLEASON: We will go into that further in the morning. We have got to take time to go over the entire testimony, but it was a joint offer and was compiled from their books. How could it be our exhibit when we had to go right down to their books to get it? It was introduced for all purposes in the case. It was the thing the gentlemen of the Commission absolutely relied upon. It is the thing we are bound to rely upon, because they were compelled to rely upon it, and now to shift the rule of evidence, that because the Commission was bound to rely upon this, and that we are bound to rely upon it, now that they can introduce a new standard and supplement this, which was taken from their own books, and Mr. Bikle knows that that is the form that they always get it from their own books, and the technical construction of trying to appeal to that, is simply

technicality and is not fair. He knows that every distribution sheet that comes from that railroad company is made in that form.

MR. GOWEN: Mr. Bikle was not concerned in the matter at the time this blue print was prepared. I do not know whether Mr. Gleason was or not, but he has not stated the facts.

MR. GLEASON: Did you not use that very same blue print as a matter of convenience for the Chestnut Hill case?

THE COURT: Are you through with this witness?

MR. GLEASON: We withdrew the objections, as I recollect.

THE COURT: The ruling was that the paper was admitted upon compliance with the stipulation into which counsel had entered. If that stipulation is not made it is out of evidence. If it is made it is in evidence.

If you want to add anything to that it is your privilege to add it.

MR. GLEASON: The only thing we added was that we objected to the distribution sheets being used to contradict the draft, the blue draft, the exhibit.

So far as our objection concerns the admissibility of this, and the question of identity, we have withdrawn that.

Objection overruled. Exception noted for plaintiffs by direction of the Court.

MR. GLEASON: May I add in addition to what I have already said, that our objection is that the exhibit offered is only a part of the original record.

THE COURT: There must be more basis for

that than a statement. If it is offered as an entirety in itself, not as the whole record, but as an entire exhibit of the record—

MR. GLEASON: Your Honor has overruled that objection.

THE COURT: No, I sustain the objection unless it is an entirety in itself. They cannot offer a part of some statement you made without offering the whole of the statement.

MR. GLEASON: I understand we are at liberty to offer the—

THE COURT: You are at liberty, either side, to offer anything that is contained in that record.

MR. BIKLE: If Mr. Gleason wants to offer any evidence in conjunction with that, that is not an entirety, it can go in now.

THE COURT: It is admitted with the understanding that it is an entire offer in itself. If anything is discovered that should go in with it as part of it, that may be offered without objection.

H. H. TWOSE, having been duly sworn, was examined and testified as follows:

By MR. BIKLE:

Q. What is your occupation?

A. Accountant.

Q. With what firm are you employed?

A. Price, Waterhouse and Company.

Q. How long have you been an accountant?

A. I have been an accountant for several years. I have been with Price, Waterhouse & Company for the last three years.

Q. Were you employed by the Pennsylvania Railroad Company to make an examination of the distribution sheets of the Tyrone region on this line for a period from October, 1904, to June, 1907, inclusive?

A. I was.

Q. When did that take place, in a general way?

A. It was during April and May of this year.

Q. What sheets did you examine?

A. The car distribution sheets which are here on the table.

Q. How do you know you examined those particular ones?

A. Before Mr. Haley brought them over here I examined the seals which we placed on them in Mr. Haley's presence some time during May of this year.

Q. Those seals were unbroken?

A. Those seals were unbroken when I examined them over here.

By Mr. Gleason:

Q. You state that these are sealed in the same manner now as they were when you left them?

A. Yes.

Q. Did you hear Mr. Haley testify that they had gathered them together and put them in that shape?

A. I could not hear what Mr. Haley was saying.

Q. If he did testify that those sheets were gathered together and put in that shape and sealed, then you are mistaken, are you not?

A. No.

Q. If you did that after they were returned to him, then you are mistaken?

A. I am not mistaken. We went over to the Pennsylvania Railroad offices, took those sheets over there and both of us assisting, Mr. Haley and I, the sheets were put in the package and sealed by me and my assistant.

Q. That is they were loose when you and Mr. Haley put them in there?

A. They were bound together, month by month.

Q. They were not loose then?

A. No.

Q. And Mr. Haley and you then put them in these

packages and sealed them up, is that your statement of it?

A. Exactly.

Q. What position do you occupy?

A. I am an accountant.

Q. How many men worked on this job?

A. On this particular region, Mr. Ballingaugh and myself only.

Q. Are all the figures and the writing either in your hand or his?

A. None of the writing on these sheets is in mine.

Q. These are the railroad sheets?

A. These are the railroad sheets.

By Mr. Bikle:

Q. Did you have also in connection with your work this blue print already offered and received in evidence as Defendant's Exhibit No. 1?

A. I did.

By Mr. Gleason:

Q. How do you know you had, is there any mark on that paper by which you identify that as the paper you had in your possession?

A. I remember these ink spots for one thing (indicating on exhibit).

Q. And that is all you recollect.

A. No, I can easily prove that these are the figures by the records which I took from them.

Q. But before you can prove that you can identify this as being the exact sheet, before you do prove that you identify this as being the exact sheet?

A. That looks extremely like it.

Q. Is it proposed by your testimony to change any figures that are on this blue print; you know the result of that—

A. Yes.

Q. Is it proposed by the account you have made up here to change some result on this blue print?

A. Yes.

MR. GLEASON: We object to any testimony from the witness on the stand that will change or alter the figures on the blue print marked Defendant's Exhibit 1.

THE COURT: That is on the ground, as I understand you, that they cannot vary the evidence upon which the Commission made its findings?

MR. GLEASON: It is incompetent, irrelevant and immaterial, being matter that was submitted to the Commission upon which it made its findings, as a basis upon which the Commission had to act, taken from the books of the railroad company; that they cannot now bring in an outside witness to change the face of that record upon which the Commission relied, and because we are bound by the reliance of the Commission upon the fundamental fact that lies before the witness.

Objection overruled. Exception noted for plaintiffs by direction of the Court.

By MR. BIKLE:

Q. You have also had before you the Commission's opinion giving the amount of additional tonnage which, under an additional car supply, might have been shipped?

A. Yes.

The Court adjourned until Tuesday, October 10, 1916, at 10 o'clock.

Philadelphia, Tuesday, October 10, 1916, 10 a. m.

Present: Parties as before noted.

Direct-examination of H. H. Twose resumed.

By MR. BIKLE:

Q. Mr. Twose, you testified yesterday afternoon, as I recall, that in making your examination you had

before you the distribution sheets, the report of the Interstate Commerce Commission upon the case, and the blue print which has been offered in evidence as Defendant's Exhibit No. 1. Is that correct?

A. That is correct.

Q. Do you know what the Commission found to be the fair rating of the plaintiff's mine?

A. Five hundred and sixty tons per day.

THE COURT: I suppose the fair rating means that the fair and reasonable business expectation is that if they were fully supplied with cars their output would amount to that much? Is that the idea?

MR. BIKLE: I think that is a fair description, your Honor.

THE COURT: We will understand it in that way, then, that if they had all the cars which they could use, then their mine equipment was such that they could ship that many tons per day?

MR. BIKLE: That is right.

By MR. BIKLE:

Q. What did the Commission find would be the fair number of days per month the mine could have worked?

A. Twenty-two.

Q. How many months are included in the first period of this case, extending from June 1, 1902, to October 1, 1904?

A. Twenty-seven months.

Q. What would the aggregate tonnage be for that period if there was a full supply for every working day?

A. 332,640 tons.

Q. What did the Commission find would have been the output with the cars to which the Commission found they would have been entitled?

A. In this first period?

Q. Yes.

A. 120,415.68 tons.

Q. What percentage is that of the full possible output of the mines with the supply of cars as first indicated?

A. 36.2 per cent.

Q. Is there anything on the blue print which corresponds with that figure?

A. Yes, sir.

Q. What is it?

A. If you take the quarterly percentages shown on the blue print for the nine quarters of that period —that is, the percentage of cars available for distribution to the regional rating—take those nine percentages and add them together and divide by nine, you arrive at your percentage, which I mentioned before, of 36.2.

Q. That is the average, then?

A. That is the average.

Q. Of those percentages?

A. Of those percentages.

Q. And those percentages are the percentages that are found in the eleventh column of the blue print?

A. Yes, sir.

Q. How is that column headed on the blue print?

A. "Per cent. based on division rating."

Q. During the second period, extending from October 1, 1904, to June 30, 1907, the Commission's statement as to the fair rating and the number of working days remain the same?

A. It does remain the same.

Q. How many months are there in that period?

A. Thirty-three months.

Q. What would be the total tonnage with a full output for every working day?

A. 406,560 tons.

By The Court:

Q. So we can follow your testimony, Mr. Twose,

as we go along, that merely means that taking thirty-three months, twenty-two days in each month, and an output of 560 tons a day, and making a calculation from those three bases, you get the result 406,560 tons?

A. Exactly.

By Mr. Bikle:

Q. What did the Commission find would have been the output with the share of cars to which the Commission found this mine entitled in this second period?

A. 214,257.12 tons.

Q. What percentage is that of the full output which would have been made if they had mined 560 tons for twenty-two days in the thirty-three months?

A. 52.7 per cent.

Q. Does that percentage correspond to anything on the blue print?

A. It corresponds to the column to which I referred "Per cent. based on division rating," for the ten quarters of the period in question. Add those ten percentages together and divide by ten, and you arrive at this percentage., average percentage, of 52.7 per cent.

By The Court:

Q. Won't you explain right there, in the same way in which you did as to the 332,640 tons and the 406,560 tons, how the other figures of 120,415.68 and the 214,-257.12 were reached?

A. If you take the 332,640 tons for the first period and find the 36.2 per cent. of it you will arrive at the Commission's award, or the figure arrived at in the Commission's award of 120,415.68 tons.

Q. In other words, that is in the one case 36.2 per cent. and in the other 52.7 per cent. of that first utmost output of the mine?

A. Exactly.

By Mr. Bikle:

Q. You have stated that in this second period from

October 1, 1904, to June 30, 1907, there were how many months?

A. Thirty-three months.

Q. What does the blue print show with respect to the distribution during that period? Was there a distribution during the whole period?

A. No, sir. During that period there were four months in which there was no distribution to any of the mines in the region, as shown by the blue print.

Q. Has any deduction been made in this calculation on account of those months?

A. None whatever.

Q. The percentages to which you have alluded as in the eleventh column, and which are entitled "Per cent. based on division rating," are calculated with respect to what figures as appears on the blue print?

A. They are calculated with respect to the division rating for the month and the cars for distribution.

Q. Irrespective of their character?

A. Irrespective of their character.

Q. That is to say, all the cars distributed are added and the figure in that column represents the percentage relation which they sustain to the total rating for the region?

A. Exactly.

Q. What are the cars shown separately in those columns? How are they described?

A. They are described as "P. R. R.," "Individual" and "Foreign."

Q. In making your examination of the distribution sheets what were you requested to do by our company in making up the statement?

A. I was requested to make a list of such mines as received foreign fuel supply, company coal and individual cars in excess of those mines' rating for the month. That is, we were to take the percentage of cars available for distribution in the region for the month, find that percentage, and then after taking the indi-

vidual, foreign fuel and company coal cars they received in excess of their percentage of rating, to eliminate those cars and their rating from the total rating and from the cars available for distribution.

Q. When you speak of eliminating cars, what kind of cars do you refer to?

A. I refer simply to the foreign fuel, company coal, and individual cars.

Q. What is a foreign fuel car?

A. It is a car which has been sent to the region assigned, or consigned, to some particular mine by some railroad company other than the Pennsylvania Railroad Company for the purposes of sending fuel to the railroad company which has purchased it.

Q. What do you mean by a company supply car?

A. I refer there to the Pennsylvania Railroad cars which have been sent to the mine for coal which has been purchased by the Pennsylvania Railroad Company from the mine to which the car has been sent.

Q. What do you mean by individual cars?

A. I refer there to the private cars of the mines themselves.

By THE COURT:

Q. As I understand it, what you start off with is the rating of the region?

A. Yes, sir. If I may explain it in this way: Each mine has a rating——

Q. We have had that explained, and as far as this mine is concerned its rating, on the basis of it having all the shipping facilities which it could use and employing all its mining facilities to the utmost, we get a rating for this mine of 560 tons?

A. Yes, sir. Add the total ratings of all the mines in the region, and then you come to the division or regional rating.

Q. If you take in that same way the rating of the whole region you can get the proportion which this mine bears to the whole region? Is that it?

A. That is not the percentage I was referring to. The percentage I was referring to was that on any given day we will suppose that the rating of the region would be 20,000 cars, or any given month, and all the cars available for that distribution, available for distribution in the region for that same period will be 10,000. Then the percentage of the regional rating would be 50 per cent., and each mine would be entitled to receive 50 per cent. of its rating.

By Mr. Bikle:

Q. The regional rating is the aggregate of the ratings of the mines in the region?

A. All the mines in the region, yes.

By The Court:

Q. As to these cars, of the cars that are available for the purpose of the shipping of coal, some of them may belong to the mine operators themselves? That is one class?

A. That is one class.

Q. What do you call that class, the class of cars which belong to the different mine operators, their own private cars? What do you call them?

A. Private cars or individual cars.

Q. Then, we know them as private or individual cars. Now, I gather from you that cars may be used not for the purpose of shipping commercial coal, but for the purpose of shipping coal to different railroads to be used as fuel in the operation of those railroads?

A. Exactly.

Q. What do you call that class?

A. When they are not for the Pennsylvania Railroad they are called foreign fuel cars.

Q. That is to say, if one road—we will say the Baltimore and Ohio—wants coal shipped to it for its own fuel purposes and uses the cars belonging to some other road for that purpose, is that what you call the foreign?

A. If they send cars, whether their own cars or any other cars that are sent to that region for their own coal, then we would call those foreign cars.

Q. Whether they belong to them or whether they do not?

A. Yes, sir.

Q. Is there any other class of cars to which your calculation refers other than those two?

A. The company coal cars I have referred to, which would be cars which the Pennsylvania Railroad had sent to a mine to get coal to fill contracts which they had with the mine, to be used for their own purposes as fuel.

Q. Does that classification include all the classifications of cars which enter into your calculation?

A. Then, in addition to that there are the cars which are not consigned or assigned in the manner mentioned, and which still remain as cars available for distribution amongst all the mines in the region which have not received an excess in the manner indicated over their rating, over their percentage rating.

By Mr. Bikle:

Q. That is the ordinary car for general commercial use?

A. Yes, sir.

By The Court:

Q. So we get that, what that means is all the cars that are used for the purpose of shipping out coal to be distributed and sold to consumers?

A. Exactly.

Q. What we might call commercial coal, commercial shipments?

A. Yes, sir.

Q. Does that include all of the classes?

A. That includes all the classes.

By Mr. Bikle:

Q. Just one word about these foreign fuel cars.

They are cars which are sent by some foreign railroad specifically designated to the mine for its own coal?

A. Yes. That is what I meant when I said assigned or consigned to a particular mine.

Q. You have stated that you have eliminated from the statement that you have prepared mines which received more individual and fuel cars than their rating would have entitled them to?

A. Yes.

Q. And also the ratings of those mines?

A. Yes, sir.

Q. Have you eliminated any commercial cars which those mines may have received in addition to their individual and fuel cars?

A. No.

Q. Will you take, for example, the month of October, 1904, and explain in more detail how you have prepared your statement of the cars distributable in this region? That is, I mean before giving the figures specifically.

A. Do you wish me to state the mines which I have eliminated?

MR. BIKLE: Your Honor, just to make it clear, we are not attacking the Commission's finding in the period covered by what is known as the first action, from June 1, 1902, to October 1, 1904.

MR. GLEASON: So we understand that, in the first period this is not an attack on anything? I mean from July, 1902, to October, 1904.

MR. BIKLE: We are not attacking, with respect to the first period, anything that the Commission found with respect to the number of cars that you should have had. The percentage of difference is comparatively small. I mean they found only 9,000 tons. We are not attacking that.

MR. GLEASON: But your attack is directed to the second period?

MR. BIKLE: In this regard. Not as to other features of the case, but in this regard.

THE COURT: That means the cars to which they were entitled, to which the Commission found they were entitled?

MR. BIKLE: Yes, sir.

THE COURT: Then we can assume that they were entitled during that period to a certain distribution?

MR. BIKLE: We can assume, for the purposes of this case, that during the first period they were entitled to cars which would have enabled them to move in addition to what they did move nine thousand and some tons of coal.

By MR. BIKLE:

Q. Will you please proceed, Mr. Twose?

A. I have taken the region rating for cars for a month—that is, the total rating day by day—and added them together and got the total region rating for the month. This figure I may mention I have taken from the plaintiff's blue print.

By MR. GLEASON:

Q. What is that figure?

By MR. BIKLE:

Q. Give the figure.

A. 20,829 cars. That is, I have taken the total shown on the blue print and divided by twenty-five tons.

By MR. GLEASON:

Q. You have reduced the tons to cars?

A. I had to reduce it to cars to enable me to get a figure.

By THE COURT:

Q. How many cars?

A. 20,829.

By Mr. Gleason:

Q. What month is this?

A. October, 1904.

By Mr. Bikle:

Q. What is the next step?

A. Against that I placed the total cars placed.

Q. From where did you get that figure?

A. I got that from the blue print.

Q. What was that tonnage that you reduced to cars?

A. 520,725.

By Mr. Gleason:

Q. How many cars?

A. 20,829 cars.

By Mr. Bikle:

Q. You then ascertained the number of cars placed, you said, in the region?

A. I ascertained that from the blue print. The figure is 5,912.

Q. That again was ascertained from the blue print which has heretofore been offered in evidence?

A. Yes, sir.

Q. What did you ascertain from those two figures?

A. The per cent. of the region rating placed. That is, 28.38 per cent.

Q. What was the next examination you made? What did you seek to ascertain after you had found that 28.38 per cent.?

A. I sought to ascertain which mines in that region had received cars, individual, foreign fuel and company coal cars, in excess of their percentage that they were entitled to; in excess, in other words, of the 28.38 per cent. of their rating.

By Mr. Gleason:

Q. Just repeat that again, please.

A. I sought to ascertain the cars they had received,

fuel and individual and company coal, in excess of their rating, based on this 28.38 per cent. That is, if their rating were 100 cars on the basis of 28.38 per cent. available for distribution, they were entitled to receive 28.38 per cent. of a car.

By Mr. Bikle:

Q. And you ascertained which mines had received more individual, foreign and fuel cars than their percentage rating?

A. Yes, sir.

Mr. Gleason: If your Honor please, we object to the testimony sought to be drawn from the witness at this point, for the reason that the finding of the Commission that the conduct of the defendant railroad was discriminatory is not based upon any comparative finding existing between this mine and other mines in the region; secondly, that the evidence sought to be elicited from this witness would be misleading to the issue trying; and as incompetent, immaterial and irrelevant.

The Court: As I before observed, it is impossible for us to forecast what the ultimate effect of the testimony will be. So far as the questions are administrative questions we must take the findings of the Commission as the law of the case. Following whatever rule they have laid down on that, we determine what the amount of the damage is, and that is a question of fact, and that I understand is the point ultimately to which your inquiry is addressed?

Mr. Bikle: Absolutely.

The Court: On that basis we will overrule the objection and grant the plaintiff an exception.

(Exception noted for plaintiff by direction of the Court.)

By Mr. Bikle:

Q. In this examination of the sheets you say you

ascertained which mines had during October, 1904, received more individual cars and fuel cars than their rating would have given them of commercial cars?

A. Yes, sir.

Q. What did you do then in your further calculation?

A. I made a total of the ratings of those mines which had received the excess mentioned, and the number of individual and fuel cars which they had received, and I deducted that rating from the regional rating, and I deducted the amount of individual and fuel cars which they had received from the total cars available for distribution, and then that gave me the new regional rating. That is to say, a rating arrived at after deducting those figures. For the month of October the rating so deducted amounts to 3,614 cars. Deducting that from 20,829 cars gave me the remaining rating of 17,215 cars. They had received individual and fuel cars——

Q. That is, the mines that were covered by those ratings?

A. Yes. They had received 1,567 individual and fuel cars. By deducting that from the total cars placed in the region, 5,912, I have a resultant figure of 4,345 cars still available for distribution.

Q. The only cars that you excluded, then, were individual cars and fuel cars?

A. Individual and fuel cars.

By Mr. Gleason:

Q. How many cars did you say were available?

A. 4,345.

Mr. Roads: If the Court please, I understand that this testimony is predicated upon the idea that the defendant proposed to follow this testimony by the offer of these sheets, that have not as yet been produced, and that, of course, is subject to the cross-examination by counsel as to whether or not these sheets are admissible. There is no mistake about that?

MR. BIKLE: I think it was agreed yesterday that they should go in.

MR. ROADS: Not that we would agree they should go in, but that we would withdraw the objection with reference to the point that we made that they were not the original sheets. We do not know what is in the sheets. All of this testimony that this witness is giving is based upon what is contained in these sheets, and I understand that it is all predicated upon whether or not these sheets are admissible in evidence after we have had a chance to cross-examine on them. The point of my objection is that we want it understood that the figures that the witness has predicated his testimony upon, and his percentages, which is for the purpose of undermining the basis upon which the Interstate Commerce Commission found its award, are in these sheets, and whether or not they are correct we want to have an opportunity to cross-examine upon them, and if they are not correct then we want a benefit of an objection and a ruling.

THE COURT: Of course, that goes without saying. This witness does not pretend to know of his own knowledge anything about these conditions. He takes these figures as they are presented to him. Of course, his bookkeeping figures are correct, and if those figures are correct he merely gives us a tabulation.

MR. ROADS: We have an opportunity to object to this, the basis of his testimony, when these are offered in evidence?

THE COURT: Certainly. You reserve your right to cross-examine him as to the basis, and reserve your right to any cross-examination. All this witness really is is a calculating machine for us.

MR. ROADS: I understand, but the basis of his

calculation is found in these sheets that have not yet been offered.

MR. BIKLE: Those sheets were offered and received yesterday.

THE COURT: We will pass on that when the time comes. It is clear to the jury that this witness is not testifying to any facts, but ascertaining what the facts are as given to him he is merely giving you what they figure out.

By MR. BIKLE:

Q. What is that percentage which the cars placed, having eliminated these fuel and individual cars, which you have described, would bear to the region rating described as you have indicated by a reduction of the ratings of the mines, excluded in the month of October, 1904?

A. 25.24 per cent.

Q. What have you done with that percentage figure with respect to the plaintiff's mine?

A. I have taken his original rating, or, rather, his rating for the month, and I have found 25.24 per cent. of that figure, which shows the figure to which he is entitled.

Q. Then what was your next step?

A. I proceeded in the same manner with each month.

Q. Having found the cars to which he was entitled, using that percentage, did you find how many cars he received?

A. I took the number of cars he received as indicated on the blue print.

Q. Just as indicated there?

A. Yes, sir.

Q. And having found that you found whether that was more or less than the percentage of distribution to which he would be entitled under the figure you used—the cars, I mean?

A. Exactly. I prepared the schedule showing the over and short each month.

By The Court:

Q. Is that in tons or cars?

A. Cars.

Q. How many tons to a car?

A. Twenty-five tons to the car was the basis, I believe, until November 15th, 1905. I am speaking from memory now.

Q. We are taking this particular month now, October.

A. October, twenty-five tons to the car.

By Mr. Bikle:

Q. Did you go through the same process with respect to each month?

A. I did.

Q. During what period?

A. From October, 1904, to June 30, 1907, inclusive.

Q. You have spoken of the use of twenty-five tons as representing the lading of a car. Was there any change in that period in that regard?

A. I believe on November 15th, 1905—it may have been the 16th of November, 1905—the arrangement of these sheets was altered, and there was a foot note to the effect that wooden cars would be considered as thirty-five tons, and one steel car would be equal to one and a half wooden cars.

Q. You have indicated that in certain respects in this calculation that you have made you have used the figures shown on the blue print as we have described it, which has been offered as the defendant's Exhibit No. 1?

A. Yes.

Q. That involved the regional rating of all the mines, the total cars placed at all the mines, and the cars received by the plaintiff. Were there any in-

stances in which you departed from the use of the figures shown on the blue print?

A. Yes.

Q. In what months and in what respects?

A. In the months of April, May and June, 1907, I found that the plaintiff in his blue print had not included the empties over on any particular day as being available for distribution on the next day, which was a rule in force by the railroad company.

By Mr. Gleason:

Q. How do you know it was in force by the railroad?

A. From a footnote, I believe, on some of the sheets showing that.

By The Court:

Q. You made your calculation based upon that fact, which you understood to be the rule, whether it was the rule or whether it was not?

A. Yes, sir.

By Mr. Bikle:

Q. In all other respects excepting during those months that you have alluded to you took the figures as they appear?

A. No.

Q. I mean with respect to the total cars placed at all mines?

A. In respect to that I did.

Q. And in those three months you made that change for that reason?

A. Yes, sir.

Q. What was the other change you made, and for what reason?

A. The cars received by the plaintiff, as shown on his blue print, for the months of February, March, April, May and June, 1907, did not include empties over, and I included those empties over which were available from day to day.

Q. As shown on the distribution sheets?

A. As shown on the distribution sheets.

Q. And those are the only instances in which in the calculation that you made you used figures different from the plaintiff's blue print so far as the regional rating of all the mines, the total cars placed at all the mines, and the cars placed at the plaintiff's mine was concerned?

A. Yes, sir.

Q. I show you a blue print marked, "Defendant's Exhibit No. 3," and ask you whether that is a summary of the calculations which you have made for the months extending from October, 1904, to June 30, 1907, and whether it has been made in the manner which you have described?

A. It is the summary which I prepared, and it has been made in the manner in which I described.

Mr. Bikle offered in evidence the blue print marked, "Defendant's Exhibit No. 3," as a summary of the calculation made by the witness in the manner described.

Mr. Roads: If the Court please, we object to the offer of this summary prepared by the witness for the reason that it attacks the blue print called the distribution sheet that was offered in evidence, and is part of the record on which the Interstate Commerce Commission based its finding, which distribution sheet was offered in evidence pursuant to the suggestion of the Interstate Commerce Commission examiner after being prepared in pursuance of the understanding had between the plaintiff and defendant before the examiner at the office of the Pennsylvania Railroad Company, the defendant, in Philadelphia, and submitted to counsel on the other side and then placed in evidence. On the ground of estoppel, the company cannot now, after the production of a paper by joint action, pursuant to the suggestion of the Interstate

Commerce Commission, attack in this Court that distribution sheet. It is further objected to that this sheet contains the statement "Cars received by plaintiff as per plaintiff's blue print." The plaintiff denies that it is plaintiff's blue print in the sense that it is intended, but that it is the plaintiff's and defendant's blue print.

THE COURT: This calculation may be received not as a statement of any of the facts stated in it, but merely as to what a calculation basis, as he has explained his calculation, for October, 1904, would be for every month during that second period.

MR. ROADS: The objection goes to emphasize the position that we have taken heretofore on the first offer of defendant's Exhibit No. 1, wherein your Honor will remember that you admitted it as a declaration of the plaintiff against interest. It is to emphasize that objection that we repeat it now.

THE COURT: That does not preclude you from showing what the fact is. If there are any errors in this statement that you submitted, I will say now that I do not forecast any objection to your showing what they are, or that this calculation is based upon an erroneous statement of fact, or a misstatement basis of calculation. We are accepting it, and that I understand is all that this witness pretends to tell us, taking the facts shown on that blue print and making the calculations from them the calculations are right, but he does not vouch for the facts because he does not know anything about the facts. The substantial situation here now and I shall so charge the jury, is that so far as the administrative findings of the Commission are concerned they are the law of the case. So far as the facts are concerned, the number of cars and everything else that enters into what your damage is, that is a fact to be found by this jury.

Cross-examination.

By Mr. Gleason:

Q. Where do you live?

A. 5434 Sansom Street, Philadelphia.

Q. You are employed in this instance by the Pennsylvania Railroad Company?

A. Yes.

Q. To do this work?

A. Yes.

Q. Were you employed personally or your company?

A. The company was employed.

Q. The New York Audit Company?

A. No, sir.

Q. What company is it?

A. Price, Waterhouse & Company.

Q. What is your position with that company?

A. I am an accountant.

Q. You are just one of the accountants?

A. Yes, sir.

Q. Do you mean to say that you are just one of the rank and file?

A. No; I am one of their senior accountants.

Q. What experience have you had as an accountant?

A. I have had three years' experience with Price, Waterhouse & Company.

Q. That is, you worked three years at it?

A. I was experienced as an accountant before I went to Price, Waterhouse & Company.

Q. How long have you been an experienced accountant?

A. I would like to know just what you mean by an experienced accountant. If you mean a public accountant——

Q. I would like you to tell me what it is.

A. As a public accountant I have had three years' experience.

Q. Three years' experience?

A. As a public accountant.

Q. You were a bookkeeper before that, were you?

A. I was a bookkeeper and other things, yes.

Q. You have had three years' experience as an accountant with this company?

A. Yes, sir.

Q. When were you employed to go over this? When did you start your job?

A. In April of this year.

Q. What date?

A. (Referring to note book.) Without going all through my note book, I think April 7th.

Q. You have got that in your note book, have you?

A. Yes.

Q. When did you finish it?

A. The last day I worked on it was May 23rd.

Q. That is, you started in on April 7th, and the last day you worked was May 23rd?

A. Yes, sir.

Q. Did you work all the days between those times?

A. No, sir.

Q. Will you give us the number of days you worked at it?

A. I can if I calculate. I did other work in between.

Q. Certainly, calculate. That is what you are there for.

A. I make it sixteen days. I am not prepared to vouch that that is absolutely accurate.

Q. It may be less than that?

A. No, it would not be less. It may be more.

Q. You are positive it is more than that?

A. I cannot say positively unless I look up my time sheets.

Q. You do not know whether it is more or whether it is less, do you?

A. I can say that I did work sixteen days.

Q. Sixteen full days?

A. Yes, sir.

Q. How many hours a day?

A. I do not see what this has to do with the case at all.

Q. What is that?

A. I do not see that that has anything to do with this case at all.

Q. If you are the judge trying this case, you may pass on it.

A. Some days I worked eight hours, some days I worked four hours, and some days I worked six hours. Mostly eight hours.

Q. Mostly eight hours?

A. Yes, sir.

Q. Some days four hours and some days six hours?

A. The four hours would be mostly Saturdays.

Q. You did not work on Sundays?

A. No.

Q. Where did you do this work?

A. In our offices in the Commercial Trust Building.

Q. Here in the city?

A. Yes, sir.

Q. You did not leave your office at all?

A. Oh, yes; I left the office.

Q. Of course, but to do this work you did it in the office?

A. I didn't sleep in the office.

Q. That is rather strange that you didn't. Who brought you these books or these papers that are wrapped up here lying before you?

A. I went over to the Pennsylvania Railroad Company's office and obtained them.

Q. You did not know what they were?

A. Except what is written on them.

Q. Except what they told you?

A. No; except what is written on them?

Q. Except what is written on them?

A. Yes, sir.

Q. Of course, that is conclusive with you, isn't it? When you see anything written on a piece of paper that is conclusive with you?

A. Well, it depends on the circumstances.

Q. That is, if it is the Pennsylvania Railroad Company?

A. Oh, no.

Q. What are the circumstances?

A. If you will state a case I will tell you.

Q. What are the circumstances that you have in mind in this particular instance? That is the case I am stating.

A. I told you what I saw written on the sheets.

Q. That is all you knew about it, what you saw written on the sheets?

A. That is all I knew about it.

Q. This was just this April of this year?

A. April of this year.

Q. So that in these packages wrapped up here are what they call the distribution sheets?

A. Yes, sir.

Q. That is what the papers say they are?

A. Yes, sir.

Q. That is what is printed on them?

A. Yes, sir.

Q. Do you mean to say that there is a sheet for every day in the year there?

A. No; there is no sheet for Sunday.

Q. No sheet for Sunday?

A. No.

Q. And for every other day there is a sheet?

A. To the best of my recollection now there is. I have not seen the inside of those sheets since May.

Q. You have not seen them since May?

A. No; not the inside.

Q. Will you break open one of those packages and look at it a minute?

(The witness broke the seals on one of the packages and took sheets from the same.)

Q. They are the sheets for what period?

A. This is April, 1907.

Q. Do you swear that those are the same sheets that you made this statement from?

A. I do.

Q. Have you any mark on them?

A. They were sealed in my presence. I assisted in sealing them.

Q. You assisted in sealing them?

A. Yes, sir.

Q. Have you any mark on these sheets to identify them as the same sheets you made up your statement from?

A. None whatever.

Q. Your method of identifying these sheets, then, is not from the sheets, but because there is a red seal on the outside? Is that it?

A. Because it is the seal of Price, Waterhouse & Company.

Q. It is the seal of Price, Waterhouse & Company?

A. Yes, sir.

Q. That is your seal?

A. That is our seal.

Q. And that is the only thing you go by?

A. That is all I go by.

Q. These were out of your possession how long?

A. From sometime in May—probably May 23rd—until we received them from the Pennsylvania Railroad Company yesterday morning.

Q. From May, during June, July, August, September and October. Who is the custodian of this seal?

A. Our stenographer.

Q. Your stenographer?

A. Yes, sir.

Q. Have you had the seal in your possession all this time?

A. Personally?

Q. Yes.

A. No.

Q. Has this seal been used on these papers, but not other papers since that time, to your knowledge?

A. They have been used on other papers.

Q. In your business?

A. In the business.

Q. And all you base your identification of this paper on is a seal that your stenographer carries around, and you saw this sealed up, and you say that is the same seal that was put on in your presence in May?

A. Yes.

Q. How do you swear to it? Is not the seal that she puts on at any time just like any seal that she puts on at any other time?

A. Oh, no; she keeps this seal in the drawer.

Q. Each time she makes a different impression?

A. She keeps the seal in the drawer.

Q. And nobody can get at it?

A. Oh, no.

Q. And she never uses it without you are there?

A. Oh, I never said that.

Q. You did not say that?

A. No.

Q. Who explained to you about these assigned and unassigned cars? Who explained that rule to you?

A. My recollection now is that it was Mr. Haley.

Q. He is an employee of the Pennsylvania Railroad Company, is he not?

A. Yes, sir.

Q. And he gave you this explanation?

A. Yes, sir.

Q. You were not called before the Interstate Commerce Commission at Washington with this sheet, were you?

A. No, sir.

Q. You were not requested by this railroad to make out the sheet during the time of the hearing at Washington?

A. No.

Q. You testified here, or in your testimony you referred to the making up of this sheet. You referred to a period of three or four months, April, May and June, 1907, of cars held over. I ask you to find the sheets for those months.

A. This is one of them. (Indicating.)

Q. So this may get on the record, see that I am correct: I hold in my hand a distribution sheet, Pennsylvania Railroad Division, cars on the Tyrone Division, Tuesday, April 30th, 1907. Now, indicate in what column you found the holdovers?

A. The empties over?

Q. The empties over, or whatever you want to call them.

A. "Unconsigned loads over, hopper, steel, the last two columns of unassigned cars available for loading." "Unconsigned loads over, hoppers, steel, the last two columns of unassigned cars available for loading."

Q. There are two different kinds of lead pencil used on that sheet, apparently, are there not?

A. Apparently there are, yes.

Q. That is, there is a heavier lead pencil and a much lighter lead pencil?

A. Yes, sir.

Q. That is, the lead pencil along certain columns is quite heavy, is it not?

A. It is.

Q. And at other places very light?

A. Yes, sir.

Q. Is that an indelible lead pencil effect on there?

A. I don't know. I did not put these figures here.

Q. You are an expert accountant. Can you tell?

A. Is an expert accountant supposed to know anything about pencils?

Q. I don't know what an expert accountant is supposed to know. That is what I am trying to find out.

A. I know nothing about the pencil marks on the sheets.

Q. You do not know anything about that at all?

A. No.

Q. You do not know whether it is a common everyday lead pencil effect or an indelible lead pencil effect?

A. Not at all. I am not an expert on pencils.

Q. You know the difference between a pen effect and lead pencil effect, do you not?

A. Yes.

Q. But you do not distinguish these at all?

A. I can see that one is light and the other dark, that is all I can see.

By The Court:

Q. You cannot see anything more than the average man can see?

A. No more than any other man can see there.

By Mr. Gleason:

Q. Is there anything on these sheets to show when these hold overs were delivered at the mines; look at the sheet?

A. The sheet itself—I do not quite get your question.

Q. You know that there is a certain hour in the day that the cars will be delivered to the mines, is there not?

A. Yes.

Q. That is bound to occur?

A. Yes.

Q. The date at which these cars are delivered, is that right here?

A. This indicates the date at which the cars were delivered.

Q. That is the day of the month?

A. The day of the month.

Q. Is there anything on these sheets throughout

all of them, that you have given here—and if you are not certain I want you to look at it—is there anything on these sheets to indicate whether the cars were put in at 6 o'clock in the morning, 7 o'clock in the morning, 10 o'clock, at noon, or in the afternoon, of a certain day?

A. I believe not.

Q. That is the only information these sheets gave you from which you compiled this statement was simply the information of the date the car was put in there and not the time of the day?

A. Exactly.

Q. Did you have any instruction from this railroad regarding any average that you should strike about cars that might have been placed there too late for the men to fill that day?

A. No.

Q. They did not tell you that you were to make any concession to this man for any percentage of cars that might have been delivered too late to fill on the day they were put in and would have to be filled in the next day; they did not tell you to put in anything on that account in his favor?

A. No.

Q. They told you arbitrarily that every time a car was held over to count that as two cars against him, that is, not as two cars, but they told you to count that car as a car delivered to him on two days?

A. No, you have got the wrong impression. I have simply taken the car here as being delivered. They told me nothing about counting that over from one day to the other. If they were put on this sheet as being delivered on a certain day I put them as being delivered.

Q. On that day?

A. Yes.

Q. We will state this thing hypothetically. Supposing in the month of April you found there that a car had been put into their siding on the 10th?

A. Yes.

Q. And it was there on the 11th?

A. I would not know that from the sheet.

Q. You would not know that from the sheet?

A. No.

Q. You would not know when the car was held over from the sheet?

A. There is nothing there to tell me the car was held over except this "unconsigned empties." I cannot tell you whether it was placed there on the 10th or anything else.

Q. What is a hold-over then?

A. It is a car that has been placed in there at some prior date, and it is being held over on their siding which they have not used, and it is counted and is brought forward to the next day's sheet.

Q. It is counted twice now, is it not?

A. Yes.

Q. The one car is counted against these people twice and it is held over?

A. Yes, it is so for every mine.

Q. That information is volunteered; I did not ask for it. But I want to put this question, that so far as this mine is concerned, a car that is held over and was there three days is counted three cars, and four days four cars?

A. Yes.

Q. And if it is held two days it is two cars?

A. Exactly.

Q. And yet this sheet gives you no data as to the hour of the day that car was loaded or put in or removed?

A. It does not.

Q. Entirely blank on that?

A. Yes.

Q. Have you anything on these sheets to show deliveries of cars on Sundays?

A. My recollection is that there is no sheet here.

Q. We do not want your recollection?

A. (After looking at sheet.) There is no sheet in there for Sunday.

Q. Is there anything on the sheets of the other days to show deliveries of cars on Sundays?

A. No.

Q. That appears all throughout these, does it?

A. Yes.

Q. And according to these sheets then, if these sheets had a reflection of the actual delivery of the cars to Mr. Minds, then basing your statement generally on what you have seen in these sheets, there were no deliveries of the cars of Mr. Minds on Sunday, if these represent delivery?

A. Unless they are in the unconsigned empties held over. I cannot tell you as to that.

Q. I know you cannot tell me as to that, but you can tell me whether there is anything in these sheets?

A. I can only say there is no sheet here for Sundays.

Q. And there is nothing in the sheets to indicate delivery on Sunday?

A. No.

Q. How does it come, if you only selected three months or found three months in which you computed these hold-overs——

A. I did not compute the hold-overs.

Q. Oh, you did not compute them?

A. No.

Q. Who did?

A. I took them from the sheets.

Q. Did you compute them when you took them from the sheets?

A. I simply added the totals together.

Q. And you did that for three months?

A. Yes.

Q. Who told you to do that for three months?

A. I found that the plaintiff himself had included them in one montth.

Q. You found he had?

A. In the month of March, and I did the same for April, May and June.

Q. You found that Mr. Minds had included the others?

A. That is the other, included on the blue print.

Q. On the blue print?

A. Yes, for the month of March.

Q. On the paper that was offered in evidence here, on this paper (indicating Defendant's Exhibit 1)?

A. Yes.

Q. You found they had been included?

A. Included for the month of March.

Q. And then you took all the hold-overs you could find, did you not, or did you just take those for three months, was that all you could find?

A. They are included right the way through.

Q. Are you positive of that?

A. I am positive of that, yes.

Q. You are positive that in this second period, from October, 1907, that you computed the hold-overs all the way through?

A. No. The sheets change at one date. I can't tell you that positively; the sheets change at one date, but I do know this, that from the time the sheets change the plaintiff on his sheet counted his empties here.

Q. Did you not testify here you had only computed the hold-overs in three different months, April, May and June, 1907?

A. I said I had only added those hold-overs for those months, because the plaintiff had not done so.

Q. He had done so in all the others?

A. He had done so in all the others.

Q. Then this sheet is correct for those months, as far as the hold-overs is concerned, before the Interstate Commerce Commission?

A. Yes.

Q. The only correction you made on that is for three months?

A. Yes.

Q. There were four other months, cars were placed in there; what distinction do you make on the cars placed in February, March, April, May and June for 1907?

A. I am there referring to cars placed at the plaintiff's mine. In the first instance I am referring to——

Q. I know, but hold-overs?

A. They are both hold-overs, but in the first place I am referring to the total cars placed at all mines, and in the second place I am referring to cars placed at the plaintiff's mine.

Q. You mean in the three months you are referring generally then to the entire region?

A. To the entire region; yes.

Q. So far as the plaintiff is concerned then you referred to four months?

A. I referred to five months.

Q. February, March, April, May and June of 1907?

A. Yes.

Q. You stated in your examination that the Commission found that this mine could produce 560 tons of coal a day?

A. Yes.

Q. You mean by that that that was the finding of the Commission and not that we could not produce more coal?

A. I simply meant that the Commission found 560 tons a day.

Q. You do not presume to know, or I suppose do not know the actual capacity of our mines?

A. No.

Q. The Commission found that we could work twenty-two days per month, and I think you have already testified that if we worked at the capacity found by the Commission on the working days, as found by

the Commission, that we would have produced in the second period 357,280 tons of coal?

A. I do not recognize that figure.

Q. What would it be?

A. Let me understand that question. At 560 tons per day, twenty-two working days per month?

Q. Yes?

A. Do you want me to give you the monthly figure?

Q. From October 1st, 1904, to July 1st, 1907, working twenty-two days per month, for that period, what would we produce?

A. What do you want me to base that on, thirty-three months or twenty-nine months?

Q. On 560 tons a day.

A. Twenty-nine months or thirty-three months?

Q. I want you to base it on twenty-nine months?

A. 357,280 tons.

Q. Have you ascertained then what the per cent. of cars available for the distribution in the Clearfield region was during that period, or can you ascertain that? I think you testified it was 52 per cent.?

A. No, I did not testify that it was 52 per cent. I testified that if you took the ten percentages, it would arrive at 52 per cent., but I think I am sure that that is a wrong method of obtaining a percentage.

Q. You are sure that is the wrong method?

A. It is the wrong method of obtaining percentages, to add together and divide by 10.

Q. Have you ever been employed by the Interstate Commerce Commission?

A. Yes.

Q. They have accountants, too?

A. I presume.

Q. That is the wrong method they have adopted?

A. It is a wrong method.

Q. You say that as an expert, having worked for this railroad company; you have worked for three

years at this business, and you have done this job for the railroad company, and you condemn the method of the Interstate Commerce Commission as wrong?

A. It is not a matter of what I condemn. Any one knows that if you buy five apples at one cent, and buy one apple at ten cents, that your average is four and one-half cents an apple, and that is the method the Interstate Commerce Commission has used.

Q. That is the boyish way they are doing business down in Washington?

A. Even the wisest old man in history will acknowledge it.

Q. What figure did you give us; you take 560 tons for thirty-three months, using the multiple 33 instead of 29; I believe that was the figure you gave us before?

A. That was 406,560.

Q. If you took 52 per cent. of that, what division rate, what would it have left that we could have shipped, that is assuming that we received 52 per cent. of the division rate, how many tons would we have shipped of that 406,560 tons, our rated capacity?

A. I presume you want me to use the 52.7 figure?

Q. Yes.

A. That would be 214,257.12. You understand that that is a thirty-three months basis.

Q. And we actually shipped how much; the figures are 143,000, that is what we actually shipped; what would be our shortage if we could have shipped 214,257.12, and we only actually shipped 143,000 tons of coal; what would have been our shortage?

A. 71,257.12.

Q. Assuming that 68 per cent. of our coal in this last period has been found by the Commission would have gone to interstate points, 68 per cent., what would 68 per cent. of 71,260 tons be?

A. 48,454.84 tons.

Q. If the Commission found that our loss in this particular was 25.2 cents per ton, what would have

been the car shortage, multiplying 48,454.84 tons by 25.2 cents?

A. $12,210.62.

Q. Again taking the figures of the Interstate Commerce Commission, which you have used in your calculation, with the actual tonnage shipped in the second period of 143,000 tons, and assuming that the percentage of that actual tonnage shipped was 68.12 per cent. interstate, what would it be in actual tonnage of interstate shipments, how many tons; taking the 143,000 tons, which is the actual tonnage shipped from the mine in the second period as found by the Commission, and as evidently not disputed in the case, and taking the percentage of that 143,000 tons that was shipped to interstate points, at 68.12 per cent., what would be the tons shipped interstate?

A. There is one question I would like to ask; when you gave me that percentage before, did you give me twelve one hundreds?

A. I did not; I gave you 68. The exact figure is 68.1213. I cut off some decimals and made it just 68.12.

A. Now you want 68.12 per cent. of 143,000?

Q. Yes.

A. 97,411.68.

Q. The commission having found that owing to the discriminatory conduct of the defendant, that the actual cost per ton during the second period of mining coal was 1.08, and that if we had not been discriminated against we could have mined it and produced it at 88 cents, showing therefore an increased cost of 20 cents a ton, as found by the Commission, what would be the award under those figures at 20 cents for the increased cost on 97,411.68 tons?

A. $19,482.32.

Q. Reverting to the figure you had before of $12,210.62, I would ask you to add that $12,210.62——

A. $31,692.94.

Q. What was the finding of the Commission for that second period?

A. I have not the copy of that. I could not remember the figures.

Q. Get your copy.

THE COURT: What is it that you are asking?

MR. GLEASON: He has made a calculation showing the award on the second period for the two branches of damages that we claim for in that period. We claim first for damages and the Commission so awards us, for damages for the increased cost of production. That is one branch of the case. The Commission found that on account of the discriminatory practice against us, the cost of our coal was $1.23, and that it could be produced for 88 cents; in the second period they found that it cost us $1.08 to produce our coal, and we ought to have been able to produce it for 88 cents. That is the first element of damages. It would be the increased cost of production by reason of the discrimination of this company.

THE COURT: What is the use of our taking up the time to ask this witness what the Commission found as to these figures when we have them right here before us?

MR. ROADS: The purpose is to test the result of the finding the Commission bases——

THE COURT: It is all right to ask this witness on what basis he made these calculations, and then if he was misinformed, as to what the proper basis was, why, of course, he would say his calculation would be as wrong as the basis, because all he says is his calculation is right, assuming his basis is right. This witness, I understand, does not profess to be more than a calculating machine for us.

MR. ROADS: And in that sense, on the cross-examination my colleague was showing by his taking 52 per cent. of the distribution as the distri-

bution to the Tyrone Division, the result produced by that percentage is almost within a few dollars of what the Commission awarded.

MR. GLEASON: In other words, the purpose of the examination is, from our own standpoint, to test and prove the award of the Commission.

THE COURT: I understand this 52.7 percentage is a mere average of a number of other percentages, and he has followed it because that was given to him, without vouching for the correctness of that method of reaching the general percentage, the real percentage.

MR. GLEASON: Just as the witness the other day took the $1.23 as a standard and started to figure on it. That is what has occurred in this case.

EDMUND C. HALEY, recalled.

Paper marked Defendant's Exhibit No. 4, October 10th, 1916, J. C. W.

By MR. BIKLE:

Q. I show you paper marked Defendant's Exhibit No. 4, entitled, "General notice to shippers of bituminous coal," and ask you what that is?

MR. GLEASON: What is the purpose of this?

MR. BIKLE: I mean to offer this and show the rule of distribution which was in effect when the proceedings on which this action was founded were before the Commission and which was discussed and ruled upon by that tribunal.

MR. GLEASON: It is objected to as incompetent, irrelevant and immaterial.

THE COURT: The Interstate Commerce Commission has found that a certain rule was in effect. They have found whether or not that was a dis-

criminatory rule. If the Interstate Commerce Commission says that that was a discriminatory and unfair rule, we take their ruling on that as the law of the case. That rule is then a fair rule, and we will not permit the other side to attempt to attack the correctness of that finding, because it is not our place to decide whether these rules are fair or whether they are not fair. They are the law of the case. We take them as they are declared to be.

MR. ROADS: If Your Honor please, the witness is an accountant, as I understand. Do I remember?

THE WITNESS: I am a clerk.

THE COURT: He is in that department. They put out certain rules for the convenience of everybody, and as a practical necessity. They are put out in printed form and distributed as the rule of the company. They do not pass upon it, whether it is a fair rule, or unfair rule, or a proper or an improper rule, but they do know as a fact whether that is the rule upon which they are directed to act.

MR. ROADS: It is not proposed either to show that every notice of this rule was visited upon the plaintiffs in this case. There is nothing but a copy of a paper here and it is offered, and the witness proposes to establish a rule of car distribution, is it?

MR. BIKLE: Yes.

MR. ROADS: In that form.

THE COURT: While, of course, that is in print, we know that it was printed from a copy, and necessarily must have been, or it could not have been set up, but what we are concerned with is whether or not that is their real rule, not whether it is a copy from which the printing was done.

MR. ROADS: There is another objection to it,

if your Honor please. This, by reference to it, shows that it is a general notice to shippers of bituminous coal dated January 1st, 1906, in accordance with the circular letters issued to shippers of bituminous coal in June last. I object to it unless they put in all that relates to this circular letter and include in their offer that they propose to visit notice upon the plaintiffs in this case of these matters.

THE COURT: If the purpose is to show by this witness, or any witness who knows, whether or not that was the rule rating adopted by the railroad company at a particular time, I will take the responsibility of permitting them to do it without going to the manuscript, because if in that form the rule was put out and distributed to their employees, and to shippers and others, then in real substance it becomes the rule, and if there was a mistake made in the printing of it, and it does not follow the manuscript, that becomes the rule which they put out. I will admit and give you an exception.

Exception noted for plaintiffs by direction of the Court.

MR. ROADS: I believe Your Honor gave us an exception on overruling the objection heretofore made in regard to the offer of this sheet? If not, Your Honor will grant it?

THE COURT: I think the record fully shows that.

By MR. BIKLE:

Q. What is this document, marked Exhibit 4, that I show you?

A. It is a general notice, sent out to all mine operators, shippers of bituminous coal, regarding the distribution of cars after January 1st, 1906.

Q. How long did that rule remain in effect, do you know?

A. That rule remained in effect until the 31st of October, 1910.

Q. Do you know what was the occasion for the change?

A. The order of the Interstate Commerce Commission passing on this rule.

MR. BIKLE: I offer it in evidence.

By MR. ROADS:

Q. You say it was intended to be sent out?

A. No, sir; it was sent out; it was printed.

By MR. GLEASON:

Q. How many times was it changed?

A. That notice was not changed between January 1st, 1906, until October 31st, 1910.

Q. It was not changed?

A. No.

Q. How many times had it been changed before January 1st?

A. I could not answer that.

Q. Have you any idea?

A. No.

Q. Have you no knowledge on that at all?

A. No.

Q. Were you working for the railroad company at that time?

A. Yes, but not in connection with work of this kind.

Q. Can you get the different variations of this rule, from July 1st, 1902, down to July 1st, 1907?

A. I will try to.

Q. Was not this the rule that the Interstate Commerce Commission declared discriminatory?

A. That was the rule, that is the one they acted on.

MR. BIKLE: In the finding of the Commission in the present proceeding there is a reference made to the previous finding of the Commission in the case of the Hillsdale Coal and Coke Company vs.

the Pennsylvania Railroad Company with respect to the rules of distribution which should prevail. We desire to offer in evidence a certified copy of the Commission's report and order in the case of the Hillsdale Coal and Coke Company vs. the Pennsylvania Railroad Company, Opinion No. 1383.

MR. ROADS: What is the purpose?

THE COURT: As I follow it the Commission incorporated the findings there made in their findings made in this case.

MR. BIKLE: They referred to it by reference to the——

THE COURT: Which they declared were a part of their findings.

MR. GOWEN: They established in the Hillsdale case the rule of distribution which should be followed.

THE COURT: It seems to me the proper view of their administrative findings is that that is law and you get that as you would get any other law, by reference to it. You do not have to prove your law by evidence, but inasmuch as they incorporated that finding with this finding, it becomes a part of it. For whatever bearing it has, you may take it.

MR. ROADS: We think they ought to point out what relevancy they claim.

THE COURT: It is only admitted on this ground. I think it is a matter which the Court would be bound to take judicial notice of, that you could refer to, and say that that was the law of this case. Why? Because the Commission had so ruled in the Hillsdale case, and that you would not be required to establish your law through the evidence, but in their finding they referred to that, and by reference they made that ruling a part of their ruling in this case.

MR. ROADS: But if the Court please, what I want to call to the Court's attention is that we think that counsel on the other side should point out—not offer the whole opinion in this whole case, but in fairness to the Court, the jury and the counsel on the other side, should point out what special matters in this whole record they claim have any relevancy or bearing on the points at issue here. We were obliged to do it when we offered the opinion in our own case.

THE COURT: But counsel have explained their purpose in offering this, and that is to say to make the Hillsdale opinion available in this case, whether you call it law or whether you call it a finding of fact, it is evidence.

MR. BIKLE: As to the administrative ruling.

THE COURT: I think it is in the case anyhow. I think either of you would be at full liberty to use that ruling to determine what the law of the case it, just as you would be permitted to refer to a rule of the Court. It is really a decision, and it is a decision of a Court, not only of competent jurisdiction, but exclusive jurisdiction, on administrative questions, but still I think it is unnecessary, but I can understand why counsel prefer to be on the safe side, and for that purpose and to that extent it is admitted.

Opinion of the Interstate Commerce Commission No. 1383 marked Defendant's Exhibit No. 5, October 10th, 1916, J. C. W.

DEFENDANT RESTS.

THE COURT: I would like to inquire of counsel in the case as to this matter. I understand that there is no question raised here as to the finding of a shortage in the first period of 95,123.68 tons. That is correct?

MR. BIKLE: That is correct.

THE COURT: I notice a further finding that of that tonnage the 3838.04 tons were within the interstate rule, the implication being that the termini of that were not intrastate category. Are we to take 3878.04 or 9523.68?

MR. BIKLE: 3878.04, because that is the only tonnage that is found would have moved to interstate destinations. We do not dispute here the finding of the Commission, nor the division which they make of the tonnage.

THE COURT: The only reason I called attention to it was that agreement on the 9523 without the qualification might become misleading.

MR. BIKLE: We do not dispute the division that they made.

MR. GLEASON: As I understand the Court has admitted the entire record, or it stipulated that the entire record is admitted by agreement of counsel for whatever purposes either side may wish to use it.

THE COURT: I do not understand the stipulation technically to have gone to that extent. If you mean it to be as broad as that, you may so consider it, but I understood the stipulation merely went to the distance that if there is any part of that record which either side desire to go in, either side may offer it without objection from the other side, but until it is offered, technically speaking it is not in.

It will be understood for the purposes of this case that any part of that record may be considered as in evidence and brought to the attention of the jury.

At 12.30 the court took a recess until 1.30 p. m.

1.30 p. m.

Present: Parties as before noted.

REBUTTAL EVIDENCE ON BEHALF OF THE PLAINTIFF.

MR. GLEASON: Your Honor, at this point we desire to offer the entire record and proceedings before the Interstate Commerce Commission at Washington in this matter.

THE COURT: I do not think it is necessary to do that. The entire record is considered as offered and considered as admitted. So that either of you are at liberty to refer to any parts of it that you care to.

MR. GLEASON: With that understanding, that the record is admitted, I just want to refer then to parts.

THE COURT: If there is any part of it that either of you want to have appear as part of the record of the case, put that in and we will have it entered upon the record. But either of you are at liberty, whether you offer it or not, to refer to it.

Mr. Gleason read from the record of the Interstate Commerce Commission the following testimony, appearing at page 6 thereof:

"JAMES H. MINDS, called as a witness, and being duly sworn, testified as follows:

Direct-examination.

Mr. Roads: Mr. Minds, how old are you?

Mr. Minds: 61 years of age the 10th of last August.

Mr. Roads: What experience have you had as a miner of coal?

Mr. Minds: I was raised in the hard coal region.

Mr. Roads: In Schuylkill County, Penna.?

Mr. Minds: Schuylkill County, Pa.

Mr. Roads: What experience have you had in mining coal?

Mr. Minds: I was going to tell you. I was raised right in the coal mining district and went first to work at a mine before I was eight years of age, picking slate. From that I growed up in the business and—

Mr. Roads: You have had what experience, just give in years how many years experience you have had in the anthracite and bituminous coal mines?

Mr. Minds: I have had over 40 years' experience.

Mr. Roads: Were you employed in the capacity of foreman for the Philadelphia & Reading Coal & Iron Company for years?

Mr. Minds: I did. I had charge of the Linwood Colliery at the same time. Later I had charge of what was known as the Turkey Run Colliery.

Mr. Roads: When did you come to the Clearfield region?

Mr. Minds: In 1874. The superintendent of the Coal & Iron Company, William Kendrick, would have me come out to the Clearfield District and put in what is known as the Kendrick shaft.

Mr. Roads: Have you been engaged in mining bituminous coal from 1874 to the present time?

Mr. Minds: For part of that time I was back in the hard coal region at that Turkey Run Colliery.

Mr. Roads: How many years have you been engaged continuously in mining bituminous coal?

Mr. Minds: I think since 1882 I have been continuously mining bituminous coal.

Mr. Roads: How long have you been operating at Webster No. 4 Colliery?

Mr. Minds: We started to open it in 1885. Shipped the first car of coal, I think, in July, 1886.

Mr. Roads: Where is this mine located with reference to railroads and towns?

Mr. Minds: It is between a mile and a quarter and a mile and a half west of Ramey.

Mr. Roads: Is it on the Moshannon Branch of the Tyrone Division of the Pennsylvania Railroad?

Mr. Minds: Yes, sir.

Mr. Roads: How far from Tyrone does the branch run off?

Mr. Minds: Something like between 27 and 30 miles.

Examiner Brown: Towards Clearfield?

Mr. Minds: Yes, branches off at Osceola and then towards Houtzdale, about a mile from what is known as Madera Junction.

Mr. Roads: Is that the name of the junction where the Moshannon Branch joins the main branch?

Mr. Minds: No, it is the junction—it was called Madera Junction, because that branched off to my place and to the place known as Vulcan.

Mr. Roads: What is the name of the branch on which Webster No. 4 is located?

Mr. Minds: On the Moshannon Branch.

Mr. Roads: What is its length?

Mr. Minds: Well, its terminal is at Sandy Bridge, and it begins at Osceola.

Mr. Roads: How many miles is it from Osceola to Webster No. 4?

Mr. Minds: About eleven, I think.

Mr. Roads: What town or borough is nearest to your operation?

Mr. Minds: What is known as Beulah City is the closest. Smoke Run comes next and Ramey next.

Mr. Roads: What is the population of these places?

Mr. Minds: I could not tell that exactly, possibly 1000 or 1200.

Mr. Roads: Ramey is a borough, is it not?

Mr. Minds: Yes, sir.

Mr. Roads: And its boundary line is how near to your mines, I mean Webster No. 4?

Mr. Minds: One corner of it—

Mr. Roads: Within a quarter or a half mile?

Mr. Minds: No, it takes in quite a lot of my territory. It takes in what is known as the Murray property. It takes in all of that property which is in my lease. I am speaking now of the surface. It is part of the Haggerty lease.

Mr. Roads: This leasehold estate extends over to and is included in the boundary line of the borough of Ramey?

Mr. Minds: Yes, there are 100 acres in the borough of Ramey.

Mr. Roads: What is your nearest neighboring operation, bituminous coal operation?

Mr. Minds: The nearest neighbor is the Berwind-White Coal Mining Company.

Mr. Roads: What is the name of it?

Mr. Minds: No. 7, No. 16, and No. 27.

Mr. Roads: What is the nearest?

Mr. Minds: The nearest is No. 7. Eureka No. 7.

Mr. Roads: Is that the nearest operation?

Mr. Minds: Yes, sir.

Mr. Roads: How near is that to Webster No. 4?

Mr. Minds: We run right up to each other, we are separated by the line of the property, that is all. Do you mean the distance from the openings?

Examiner Brown: The property adjoins. Now, how far is it from your tipple to theirs?

Mr. Minds: Between half and three-quarters of a mile.

Examiner Brown: On the same branch?

Mr. Minds: Yes, sir.

Examiner Brown: Yours is above?

Mr. Minds: No. Here is the junction, and this runs down to Madera, and here is the branch that runs out to my place, and they are about 300 yards from the junction on the branch that runs down to Madera.

Mr. Roads: What do you call that branch?

Mr. Minds: That is the Madera Branch.

Mr. Roads: Have you a lease with the Madera Coal & Improvement Company?

Mr. Minds: Yes, sir.

Mr. Roads: How many acres does that embrace?

Mr. Minds: I think that is 70 acres.

Mr. Roads: How many acres altogether have you under lease—I mean by you the Bulah Coal Company?

Mr. Minds: I understand. Do you mean at the present time, or that we had there?

Mr. Roads: Any time from 1902 to the present time.

Mr. Minds: I have the Haggerty lease and the Madera Coal & Improvement Company's lease.

Mr. Roads: The Haggerty lease covers 350 acres?

Mr. Minds: Yes, sir, with allowances.

Mr. Roads: What is the actual acreage?

Mr. Minds: Something over 400 acres, I think, with allowances.

Mr. Roads: Although the lease calls for 350 acres, and allowances, the allowances make up a total of 400 acres?

Mr. Minds: Yes, sir.

Mr. Roads: Now, under the Jordan lease, that was 160 acres by the terms of the lease. Is there any additional?

Mr. Minds: The allowances.

Mr. Roads: Do you know how much the Jordan lease is increased by the allowances, over 160 acres?

Mr. Minds: I don't know. I never had it run up.

Examiner Brown: About 10 acres, if it is 6 per cent.

Mr. Roads: I suppose so. I don't know. (Addressing the witness) How about the Madera Coal & Improvement Company's lease?

Mr. Minds: That was simply for 70 acres. The line was run around the crop. It did not take in the tract of land. There was no allowances.

Mr. Roads: Simply 70 acres?

Mr. Minds: That is my understanding.

Examiner Brown: Making a total of 640 acres?

Mr. Roads: Yes. (Addressing the witness) That is the total acreage that is embraced within that right to mine under the leases?

Mr. Minds: Yes, sir.

Mr. Roads: Now, what veins underlie your leasehold estate?

Mr. Minds: The D vein and the B vein and the A vein. The same veins that underlie all the region about there.

Mr. Roads: State whether or not one of those is called the Moshannon vein?

Mr. Minds: That is the D vein. It is the D vein known as Moshannon around there.

Mr. Roads: What is the reputation of that vein for quality of coal?

Mr. Minds: It has always been good.

Mr. Roads: State whether or not it has produced one of the best bituminous coals?

Mr. Minds: It was always so understood everywhere in the market.

Examiner Brown: Is it steam or domestic coal?

Mr. Minds: It is coal that is used for different purposes, steam, iron and smithing.

Examiner Brown: It is rather a splint coal, hard?

Mr. Minds: No, it is not a very hard coal. It is a bituminous coal, and the purer it is the less stratas that is in it, the better the coal, the less sulphur.

Mr. Roads: Low in sulphur?

Mr. Minds: Yes.

Mr. Roads: And high in carbon and low in ash, is that right?

Mr. Minds: That is its history.

Mr. Roads: Now, what is the thickness of the Moshannon vein on that property?

Mr. Minds: It is from 2½ to 5½ feet.

Mr. Roads: From 2½ to 5½ feet?

Mr. Minds: Yes.

Mr. Roads: What is the thickness of the B vein?

Mr. Minds: I could not tell what that is there, from the fact that we have not developed it.

Examiner Brown: You have been mining altogether on the D vein?

Mr. Minds: Yes, sir.

Examiner Brown: How much of that vein is 2½ feet thick?

Mr. Minds: Possibly one-third of it. Let me see, did I catch your question?

Examiner Brown: How much of the property you have mentioned so far—how much of that vein is 2½ feet thick?

Mr. Minds: I could not say exactly how much is 2½ feet, because it runs from 2½ in some places to 3 in some places, and 2 feet and 8 inches in some places, and 3 feet 4 inches in some places. Possibly 100 acres, though, are 2½ feet.

Examiner Brown: Can you mine a 2½ foot vein at a profit?

Mr. Minds: We have; yes, sir. It is a coal that brings a good price in the market.

Mr. Roads: What is the average thickness of these leasehold estates of the Moshannon vein? You say it runs from 2½ to 5½ feet, what would you state to be the average thickness of that vein on your property?

Mr. Minds: I never figured on that. Probably it would average 3½ up to 4 feet.

Mr. Roads: How long a time has the Beulah Coal Company mined there?

Mr. Minds: They have been mining coal there since I think it was July, 1886.

Mr. Roads: Have you mined anything beside the Moshannon vein on this property?

Mr. Minds: No, sir.

Mr. Roads: Veins B and A are both in virgin?

Mr. Minds: They are all there, yes.

Mr. Roads: How much of the Moshannon vein is left in a virgin state?

Mr. Minds: Something like 200 acres, I think, or thereabouts.

Mr. Roads: Describe briefly, Mr. Minds, your inside workings, the length of your headings, your main headings and side headings, in distance, I mean?

Mr. Minds: I could not give you that exactly from the fact that I opened my mine as near the center of the tract as I could and then worked both ways and on the northern direction I drove clean to the line of the Haggerty property, and on the western, the mines of Jordan, I drove to the line and took in that 70 acres of the Madera.

Mr. Roads: How long is that mine heading, and how wide?

Mr. Minds: I generally drive 8 or 9 feet wide. The length I could not tell you.

Mr. Roads: Can you not give us what it is, about—approximate it?

Mr. Minds: Possibly three-quarters of a mile.

Mr. Roads: Three-quarters to a mile?

Mr. Minds: Between that. I do not think it would be quite a mile.

Mr. Roads: State whether or not there are plenty of openings, rooms for miners to work?

Mr. Minds: There certainly have been.

Examiner Brown: How many rooms have you got there?

Mr. Minds: I could not tell you just how many rooms, I did not count them. You see we drive the main heading, and then we drive our side headings about 100 yards apart and every 45 feet I turn a room.

Mr. Roads: How many side headings have you leading from the main heading?

Mr. Minds: 18 or 19 from the main heading.

Mr. Roads: And from those side headings on both sides you drive what you call rooms?

Mr. Minds: Yes, sir.

Mr. Roads: State whether or not those rooms or those inside mines are of such a character as during the period from 1902 on to 1907, say the middle of the summer of 1907, you could have put miners at work, enough miners to produce the full output capacity of your mines?

Mr. Minds: I did not understand that question properly.

(Question repeated by the stenographer.)

Mr. Minds: No, I could not.

Mr. Roads: Didn't you have sufficient openings there to put miners at work so as to mine the coal?

Mr. Minds: Let me draw your attention to what you said, you said the capacity of the mines. The capacity of the mine ranges anywhere from 1000 to 1200 tons. I did not ship up to that.

Mr. Roads: I did not ask you about shipments. What I wanted to know was whether you did not have openings sufficient to put miners to work there to mine the full capacity of your tipple?

Mr. Minds: I certainly had.

Mr. Roads: What was the output capacity of your mine, say in 1902?

Mr. Minds: Do you mean what we put out at that time?

Mr. Roads: No, I asked what was your output capacity?

Mr. Minds: The facilities for output?

Mr. Roads: Yes.

Mr. Minds: Anywhere from 1000 to 1200 tons.

Mr. Roads: That is per day?

Mr. Minds: Per day; yes, sir.

Examiner Brown: Could you have loaded that much?

Mr. Minds: Yes, sir.

Examiner Brown: You had that capacity on your tipple?

Mr. Minds: Yes, sir. You see, in the first place, the capacity of the mine is based on three things. The first is the territory, the coal, the second is rolling stock, and the third is your tipple. I started in with all that, made all those preparations in the beginning when I started to open the colliery, and I maintained them up to the present day.

Examiner Brown: How many mine cars have you?

Mr. Minds: Between 145 and 160.

Examiner Brown: Say 150. What is the capacity of those cars?

Mr. Minds: A ton and a half.

Examiner Brown: What is the power?

Mr. Minds: Two 40 horse power engines for hoisting up the incline. The balance is mules.

Examiner Brown: How do you air your mines?

Mr. Minds: By furnace. Now we air it by fans.

Examiner Brown: That is run by your central plant?

Mr. Minds: Run by steam. When I said rolling stock I meant mules and wagons and the engines.

Mr. Roads: Now, as to your drift openings, is there a difference in the elevation between the drift opening and your tipple, the head of your plane?

Mr. Minds: Yes, sir.

Mr. Roads: What is that, in feet?

Mr. Minds: It is about 150 feet.

Mr. Roads: Perpendicular or on an incline?

Mr. Minds: Perpendicular. The length of the incline is 700 feet.

Mr. Roads: Your motive power is steam?

Mr. Minds: Yes, sir.

Mr. Roads: And you hoist by engine and cable?

Mr. Minds: Yes, sir; four or five wagons at a time.

Mr. Roads: What is the capacity of your tipple?

Mr. Minds: Why that is just what I explained. It runs from 1000 to 1200 tons per day. I have two tipples and one dump.

Mr. Roads: In your petition, No. 1136, you set out that you have the necessary appliances for mining and shipping from your mine at least 600 gross tons?

Mr. Minds: I took that from the rating of the company, and from what we had shipped when we got cars to ship.

Examiner Brown: Then these figures that you have been giving represent your maximum capacity?

Mr. Minds: Yes, sir.

Examiner Brown: From 1000 to 1200 tons a day?

Mr. Minds: Yes. I started out with the idea of having a colliery to ship 1000 tons a day.

Examiner Brown: Have you maintained that from 1902 to the present day?

Mr. Minds: All it lacked at any time was to put on rolling stock and put in the men.

Examiner Brown: And the plant is in good shape now?

Mr. Minds: The plant is in good shape now; yes, sir.

Mr. Roads: What is the condition of your facilities there, your tipple and your plane?

Mr. Minds: I generally strive to keep everything in first class repair.

Mr. Roads: Is it in first class condition?

Mr. Minds: Yes, sir.

Mr. Roads: Now, give us an idea of the total amount that you have invested in the plant , that the Bulah Coal Company has invested in that plant?

Mr. Minds: I never run that up exactly. Getting in there, in the first place, it was a little troublesome to get in.

Mr. Roads: Can you give us the total amount that you have invested there?

Mr. Minds: Possibly railroad cars and all would run it up between $75,000 and $80,000.

Mr. Roads: State whether or not in addition to that you have a number of cars that are not owned by the company, but are used in its business?

Mr. Minds: At the time Mr. Matz died, we had a contract for 25 cars, and after his death, Mrs. Matz did not feel able to keep up her end in regard to the cars, and I took them on myself.

Mr. Roads: You bought them yourself?

Mr. Minds: Yes, sir.

Mr. Roads: The company does not own them, but they are used in conjunction with the business of the Bulah Coal Company?

Mr. Minds: Yes.

Mr. Roads: How many individual railroad cars does the Bulah Coal Company own?

Mr. Minds: 25 of 80,000 pounds capacity?

Mr. Roads: And they cost the company how much, about?

Mr. Minds: I think it was $27,500 they cost at the shop.

Mr. Roads: And that is part of the plant, and is included in your estimate of the amount invested as being between $75,000 and $80,000?

Mr. Minds: Yes, sir.

Mr. Roads: As I understand you, the area that is operated by the Berwind-White Coal Company at their No. 7 operation—that is about a quarter of a mile from your tipple to theirs?

Mr. Minds: No, it is half or three-quarters of a mile between my tipple and Eureka No. 7.

Mr. Roads: And the territory operated by you, I mean your leasehold estate, adjoins that of the Berwind-White Coal Company?

Mr. Minds: Yes, sir.

Mr. Roads: State whether or not the Moshannon or D and the B and the A veins continue right through on to their property and the same veins are upon Eureka No. 7 as you have on your property?

Mr. Minds: They have them; yes, sir.

Mr. Roads: State whether or not at Eureka No. 7 they worked the same vein, Moshannon vein, that you have worked and are now working?

Mr. Minds: Yes, sir.

Mr. Roads: Your operation at Webster No. 4 is right in the heart of this mining region in Clearfield County, is it not?

Mr. Minds: It is supposed to be; yes, sir. There are mines there on every side of me.

Mr. Roads: It is a mining population all the way through here, is it not?

Mr. Minds: Houtzdale is a great mining district, Brisbin and Sterling. They are all close at hand.

Mr. Roads: What is the distance to Houtzdale from your operation?

Mr. Minds: About four miles, I suppose, something like that.

Mr. Roads: And Houtzdale is quite a good sized town, of 10,000 or 12,000 inhabitants?

Mr. Minds: I don't just exactly know the inhabitants.

Mr. Roads: How many miners' houses have you at your operation?

Mr. Minds: I haven't got any miners' houses. I have some houses, the same as I have the cars, but there is none belonging to the company.

Mr. Roads: There is a mining population living all around you?

Mr. Minds: You did not let me answer the question you asked me in regard to Houtzdale. Houtzdale at one time, and vincinity, was calculated to have about 12,000 inhabitants. That took in Sterling and Brisbin and men from all of those places come to work at my colliery.

Mr. Roads: State whether or not when you have steady work in your mines, there is any difficulty for you to obtain the labor necessary for you to mine the full capacity of your mine?

Mr. Minds: When I got cars regularly I never had any trouble in getting men. I could get all the men I wanted.

Mr. Roads: You were rated at 560 tons per day by the Pennsylvania Railroad Company, or 16 cars a day of 35 tons capacity each, as of February 1st, 1906, I believe?

Mr. Minds: Something like that.

Mr. Roads: It is alleged in the petition, if the Examiner please, and admitted in the answer.

Examiner Brown: Yes, sir.

Mr. Roads: What was the greatest shipment in net tons that you made or that the Bulah Coal Company made at its plant, at Webster No. 4?

Mr. Minds: Something over 15,000 tons.

Mr. Roads: Something over 15,000 tons a month?

Mr. Minds: Per month; yes, sir.

Mr. Roads: And when was that?

Mr. Minds: I don't know. I would have to go to the books.

Mr. Roads: Can you give us an idea when that was?

Mr. Minds: I ain't sure whether it was in 1899 or 1900.

Mr. Roads: About 1900?

Mr. Minds: Somewhere around there.

Mr. Roads: Now, the rating of Eureka No. 7, the Berwind-White Coal Company's mine, which is the adjoining operation to you, to your Webster No. 4, was 14 cars, was it not?

Mr. Minds: I could not tell you the rating—I was rated the highest until Berwind-White opened up their No. 28, and then they surpassed me.

Mr. Roads: (Addressing the Examiner) That appears by paragraph No. 7 of the complainant's petition. We would like to withdraw this witness for the present, and put on another witness.

Examiner Brown: Very well.

(Witness excused.)"

Mr. Gleason also read from the record of the Interstate Commerce Commission the following testimony, appearing at page 27:

"ELIAS C. DAVIS, called as a witness, and being duly sworn, testified as follows:

Direct-examination.

Mr. Roads: What is your business?

Mr. Davis: Bookkeeper and shipping clerk.

Mr. Roads: Shipping clerk for the Bulah Coal Company?

Mr. Davis: Yes, sir.

Mr. Roads: How long have you occupied that position?

Mr. Davis: About 18 years.

Mr. Roads: Did you make a table, computed from data that was kept by you, in regard to the capacity of the Bulah Coal Company's operation at Webster No. 4, showing the number of working days, the capacity at all times based upon 16 cars rating per day, showing the actual output, the loss in tons, the average price of coal, the average cost of production, the loss per ton, and the total loss between 1902 and June, of 1907?

Mr. Davis: Yes, sir.

Mr. Roads: This statement was made up by you from data made by you and kept in the books of the company, books under your charge, and kept by you?

Mr. Davis: Yes, sir.

Mr. Roads: Now, take up the first item under date of July 26th, 1902. You give there the capacity at full time as 560 tons per day, at 16 cars, 35 tons each, as 14,560 tons. That covers the monthly capacity of the mine, does it not?

Mr. Davis: Yes, 26 working days.

Mr. Roads: Now, the actual output you give as 8,234 tons. Where did you get that data?

Mr. Davis: From the coal mined and shipped.

Mr. Roads: What do you call that book you keep that record in?

Mr. Davis: It was taken from the payrolls and number of tons mined.

Mr. Roads: Have you got those books with you?

Mr. Davis: Yes, sir.

Examiner Brown: Do you sell run-of-mine coal?

Mr. Davis: That is run-of-mine.

Examiner Brown: Some of it did not go as slack?

Mr. Davis: No, sir; all run-of-mine.

Examiner Brown: When you got what your pay-rolls showed you had what was actually shipped?

Mr. Davis: Yes, sir.

Mr. Roads: My idea is to show how this first line on the statement is made up, and then make a general statement in regard to all of them.

Examiner Brown: That they were made in the same way?

Mr. Roads: Yes, sir. (Addressing the witness.) Now, explain to us how you got that actual amount of tonnage that was shipped. You have it under the head of actual output.

Mr. Davis: The total number of tons mined and shipped that month. That was taken from the report of coal shipped daily.

Mr. Roads: The books show those entries you have given here?

Mr. Davis: Yes, sir.

Mr. Roads Now, then, the loss in tons, the next item. How do you arrive at those figures?

Mr. Davis: That was the difference between the capacity at 16 cars of 35 tons capacity each, 560 tons per day, and the actual amount mined.

Mr. Roads: That represents, you say, the loss in tons, by taking the total capacity of the mines for the month and deducting—

Examiner Brown: You mean the rated capacity when you say total capacity?

Mr. Roads: Yes, the rated capacity. The difference between that represents this item of loss in tons, to wit, 6,276, under the date of this item, July 26th, 1902. Now, you have fixed the average price of coal

during the month of July, 1902, at $2.39. How did you make that up?

Mr. Davis: That is taken from our shipping book.

Mr. Roads: Have you that in court?

Mr. Davis: Yes, sir.

Mr. Roads: Just refer to that shipping book and tell us how you get at that $2.39 cost, give us the item?

Mr. Davis: I took the various orders at various prices secured during the month, the month of July, as referred to in the data. One price was $2.00, another $2.10, another $2.15, another $2.25, another $2.35, another $2.50, another $2.60, another $2.65, and another $2.75. Totalling those and dividing by the number of prices given, I got an average price of $2.39.

Mr. Roads: And those prices are actual prices received from coal shipped, as appears from the book before you?

Mr. Davis: Yes, sir.

Mr. Roads: Now, then, the next item is the average cost of production. You state that at 90 cents per ton. You reach that figure how?

Mr. Davis: That was obtained by the total amount of the payroll for the month. The payroll, including mining and all labor and all expenses attached to the month's work to put this tonnage on the cars, and divide it by the tons mined and shipped.

Mr. Roads: That is from the actual cost?

Mr. Davis: Yes, sir.

Mr. Roads: Have you a book there which that data was put in?

Mr. Davis: Yes, sir.

Mr. Roads: What do you call that?

Mr. Davis: That is called the payroll book. We keep the payrolls, and they are summed up at the end of the month. Say, two payrolls in a month.

Mr. Roads: Give us the figures from which that was made up?

Mr. Davis: Payroll, first to 15th, $2,721.61; payroll

16th to 31st, last half of July, $3,791.16; royalty on coal $903.93; making a total expense for the month of $7,416.70, divided by the actual output, that is the tons mined and shipped, 8284 tons, gives an average cost of 90 cents.

Mr. Roads: What would be the effect of a greater shipment of coal on the cost of production?

Mr. Davis: On that same basis I figured that if we had shipped the capacity of the mine, the rated capacity of the mine being 14,560 tons, our cost would have been at the rate of 83 cents.

Examiner Brown: Computed in the same way?

Mr. Davis: Yes, sir.

Mr. Roads: Averaging it all the way through, say, as near as you can tell, what is the cost of producing a ton of coal at Webster No. 4, since July, 1902, on say—suppose we make it on 8,284 tons per month?

Examiner Brown: That would be a matter of computation.

Mr. Roads: I think I have it exactly here, at 90 cents, that it is about 80 or 90 cents, somewhere in there, generally speaking, and it varies, of course, with the shipments, the greater the shipment the less the cost of production per ton.

Mr. Davis: Taking the 66 cent rate for mining, which was in effect from about April, 1903, to June, 1907, if we had worked the mines to about full capacity, we could have put the coal on the cars for about 81 cents.

Mr. Roads: That includes royalty, does it?

Mr. Davis: Yes, sir.

Mr. Roads: And any estimate for timber?

Mr. Davis: Yes, sir.

Mr. Roads: What did you estimate for timber and royalty?

Mr. Davis: Royalty was 10 cents, and about 5 cents a ton for timber, etc.

Examiner Brown: That eliminates interest on the plant, and depreciation, repairs, and things like that?

Mr. Davis: Yes, it would cover—

Examiner Brown: You did not figure any interest on the plant or repairs or depreciation?

Mr. Davis: No, that is just the actual cost.

Mr. Roads: The loss per ton you figured there, based upon these figures, is $1.49. How did you arrive at that?

Mr. Davis: The difference in the average cost of production and the average selling price of coal made $1.49.

Mr. Roads: Assuming then that you had orders sufficient to keep your mine running at its full rated capacity of 560 tons per day, your total loss under those conditions would be $9,361.24, for that month, as you have stated here?

Mr. Davis: $9,351.24 I believe is the correct figure.

Mr. Roads: Now, state whether or not the entire sheet which you have in your hands has not been computed in the same way as you have testified to in regard to the item of July 26th, 1902?

Mr. Davis: That is the item for the month of July, 26 days. Yes, the whole thing is computed on that basis.

Mr. Roads: That is up to and including June 25th, 1907?

Mr. Davis: Includes the month of June. That is not the day of the month, but it is the month of June, and 25 working days.

Mr. Roads: Oh, I see, those are working days.

Mr. Davis: Yes, sir.

Mr. Roads: I offer the paper in evidence.

Mr. Gowen: We object on the ground that it is purely speculative, and estimate, not based upon any facts.

Mr. Roads: We would say that we will follow this up by proving the loss of contracts we have had cancelled by reason of the shortage of cars and discrimination in car supply on the part of the Pennsylvania Railroad Company, the defendant.

Examiner Brown: You may cross-examine on the paper, Mr. Gowen, if you desire.

Cross-examination.

Mr. Gowen: You do not wish to be understood as saying that during the period covered by this statement you have just been referring to, your shipments were limited by the supply of cars you received?

Mr. Davis: Generally.

Mr. Gowen: I did not ask you "generally". I say during the period?

Mr. Davis: Yes.

Mr. Gowen: Do you mean to say there were not periods here when you received all the cars you wanted?

Mr. Davis: Allow me to explain.

Mr. Gowen: Answer my question, and then you can explain. Were there not periods covered by this statement when you received all the cars you wanted?

Mr. Davis: Yes.

Mr. Gowen: Now, if you want to explain.

Mr. Davis: That came about because our men had gone away owing to not receiving cars when we could have worked.

Mr. Gowen: Do you mean to say that during the summer months of these years you were not receiving all the cars you wanted?

Mr. Davis: Not at all times.

Mr. Gowen: What summers do you except?

Mr. Davis: We were crippled at all times for want of cars, either directly or indirectly.

Mr. Gowen: What summers do you except from that statement?

Mr. Davis: Our books show that we are in need of cars at all times or if we had cars that we had not the men to load them on account of the fact that at periods our men left us because we had not the cars to work.

Mr. Gowen: I think Mr. Minds testified that there

were any number of men available for miners around this neighborhood.

Mr. Davis: Yes.

Mr. Gowen: That he could always get the miners when he wanted them. Is not that the case?

Mr. Davis: When we had work for them.

Mr. Gowen: If you had work for them?

Mr. Davis: Yes, sir; when we had work for them.

Mr. Roads: You understand, Mr. Gowen, that I had not finished with the witness.

Mr. Gowen, No, I thought you had.

Mr. Roads: No, I thought you were examining on that paper.

Examiner Brown: The paper will be received and marked in evidence.

(Paper received and marked Complainant's Exhibit No. 2 of this date.)

Examiner Brown: Proceed with your direct-examination, Mr. Roads.

Direct-examination (resumed).

Mr. Roads: Now, Mr. Davis, state whether or not, owing to the shortage of cars you were compelled to cancel orders for coal?

Mr. Davis: Yes.

Mr. Roads: Orders, I mean, which were accepted?

Mr. Davis: Yes.

Mr. Roads: Now, have you made a tabulated statement covering that point?

Mr. Davis: I have.

Mr. Roads: Referring to paper entitled "Number of cars short to fill orders on our books and cars lost account of cancelled orders". Is that the paper you refer to?

Mr. Davis: Yes, sir.

Mr. Roads: Well, that covers what period?

Mr. Davis: July, 1902, to June, 1907.

Mr. Roads: How did you make that up, for instance, take the item under July, 1902, referring to 19

cars short and 29 cars cancelled. Explain how you made that up?

Mr. Davis: I secured that from the shipping book of orders entered for shipment.

Mr. Roads: Have you the shipping books here?

Mr. Davis: Yes, sir.

Mr. Roads: Turn to your shipping books and show just what that record is based on.

Mr. Davis: It refers to the various orders as covering the 19 cars. First is Ashley & Shaw Silk Company, Phillipsburg, N. J., for one car, order taken May 5th. That was one car every 20 days. There were three cars, at that time, due at the close of July on that order.

Mr. Roads: You are giving the consignee, aren't you?

Mr. Davis: Yes; another one is Asher Brakeley, Bordentown, N. J. That was three cars we lost. Joseph Brakeley, Freehold, N. J., one car per week. At the close of July we were three cars short to fill that order.

Examiner Brown: How long does that order run?

Mr. Davis: It ran with us until it was cancelled, I understood from the correspondence.

Examiner Brown: When you made the contract for 100 tons every three days, what was the contract, that it was to run for one year, or two years, or for what length of time?

Mr. Davis: Contracts were taken generally for one year, and some of these were little local orders sent to us if we could fill them. We were unable to undertake contracts because we could not guarantee to fulfill the contracts.

Examiner Brown: So when you entered in your books that this company had sent you an order for 100 tons every three days, that was a standing order, you understood, for one year?

Mr. Davis: We had no written contract. I take it

that if we had the three cars which we were short, they would have accepted them.

Mr. Roads: The order was, as I understand, good until countermanded, until forbid?

Mr. Davis: Yes, sir.

Mr. Roads: Proceed.

Mr. Davis: Under the second item cancelled, Rising Sun Brewing Company, of Elizabeth, N. J., for three cars. That order on the 11th of July was cancelled, and there was two cars due on it. Breidt Brewing Company, Elizabeth, N. J., for three cars, two cars due yet on that, and it was cancelled on the 7th of July. We have then an order taken from the Breidt Brewing Company, Elizabeth, for one gondola weekly. The four cars due at that time and on the 7th of July the order was cancelled. New Jersey Iron Mining Company, Port Orange, N. J., for 75 tons. We had shipped one car, and were one car short at the end of the month. Hygeia Ice Company, Plainfield, N. J., one car, cancelled.

Mr. Roads: Are you including in that any Pennsylvania orders that were cancelled?

Mr. Davis: No, sir.

Mr. Roads: They are all interstate orders?

Mr. Davis: Yes, sir.

Examiner Brown: That is the method you pursued in making that table?

Mr. Davis: Yes, sir.

Examiner Brown: I think that is sufficient.

Mr. Roads: And the reason those cancellations were made was because of what?

Mr. Davis: Because of insufficient cars to fill them.

Mr. Roads: I offer this sheet in evidence.

Examiner Brown: If there is no objection the paper will be received in evidence and marked.

(There being no objection the paper was received in evidence and marked Complainant's Exhibit No. 3 of this date.)

Mr. Roads: You have a number of references here, I notice, by letters to footnotes on that sheet. Referring to "E" under date of 1905, June, cancelled nothing, zero you have after that. In the footnote there is the following: "Had orders from Bulah Shaft Coal Company, New York, for Amboy". Explain that entry.

Mr. Davis: We had orders on our books to ship all surplus coal to South Amboy.

Examiner Brown: Tidewater?

Mr. Davis: Yes, sir.

Mr. Roads: Can you lay your hands on that order from the Bulah Shaft Coal Company?

Witness produced shipping book of Bulah Coal Company and refers to page 31 containing an entry, "1905, June 13th, Bulah Shaft Coal Company, South Amboy, N. J."

Those figures are what?

Mr. Davis: Numbers of cars. We were able to get 13 cars shipped that month. Before the order was cancelled we got that many off our line, and got that many to South Amboy.

Mr. Roads: What period of time was covered by this order of Bulah Shaft Company, South Amboy, N. J.?

Mr. Davis: It was an order to stand until cancelled.

Mr. Roads: Now, by reference to the letter "z", in a number of instances you refer to the footnote. Will you explain that, please?

Mr. Davis: We had orders then from Potts & Company to ship all coal to South Amboy.

Mr. Roads: Those are the mine shipments, or the business covering these various months, are they?

Mr. Davis: Yes, sir.

Mr. Roads: Showing orders that you had received, and that you could not fill by reason of shortage of car supply?

Mr. Davis: Yes, sir.

Mr. Roads: What have you to say about "y"?

Mr. Davis: Had orders from Whitney & Kemmerer to ship all separate cars to West Albany, N. Y.

Mr. Roads: Will you turn to the books and show us where you have those orders from Whitney & Kemmerer?

Witness refers to ledger under date of 1903, February 2nd, Whitney & Kemmerer, West Albany, Transfer, N. Y.

Those are car numbers?

Mr. Davis: Yes, sir.

Mr. Roads: What have you to say in regard to that order, what was the character of that?

Mr. Davis: It was an open order for all cars we had to spare on it.

Mr. Roads: Accepted and entered?

Mr. Davis: Yes, sir.

Mr. Roads: Is the fact that they are entered on the books evidence of their acceptance by the Bulah Coal Company?

Mr. Davis: Yes, sir.

Mr. Roads: How about "o", January, 1903?

Witness refers to the same book, page 7, under date of 1903, William J. Fox, Holyoke, Mass.

What is the character of that order?

Mr. Davis: Open for all shipments.

Mr. Roads: How about "a", October, 1902?

Mr. Davis: An order from William J. Fox, for Newark, N. J.

Mr. Roads: You are reading from ledger under date of 1902, October 31st?

Mr. Davis: Yes, sir.

Mr. Roads: Is that of the same character as the other orders?

Mr. Davis: Same character, yes, sir.

Mr. Roads: Good until forbidden?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the letter "x", under

date of July, August, September and October, 1902, what about that?

Mr. Davis: That order goes right on through the various months.

Mr. Roads: What order does that letter "x" refer to?

Mr. Davis: Refers to orders from Whitney & Kemmerer, ship all separate coal to South Amboy. Here is the order, it stayed open for months.

Mr. Roads: The witness refers to the same book, November, 1902, Whitney & Kemmerer, South Amboy, N. J. You had made a number of shipments during that month?

Mr. Davis: Yes.

Mr. Roads: Those numbers are car numbers?

Mr. Davis: Yes.

Mr. Roads: Who was the agent for Whitney & Kemmerer?

Mr. Davis: Mr. Jacobs is the one we had our orders from as a rule.

Mr. Roads: This last number "x" November, 1902.

Witness refers to the same book, page 40, under date of November, 1902, Whitney & Kemmerer, West Albany, Transfer.

Was that same thing true of that order?

Mr. Davis: Yes, sir.

Mr. Roads: Can you tell us from your books what price was fixed for the W. & J. Fox coal orders?

Mr. Davis: The price is entered on the books.

Mr. Roads: How much? It was in October, 1902.

Mr. Davis (after referring to book): $3.15 a ton.

Mr. Roads: What was the character of that order as to what coal was to be taken? You have here a standing order from W. J. Fox, Newark, N. J., all surplus coal at $3.15. Where did you get that statement that all surplus coal is to be embraced in that order at $3.15?

Mr. Davis: Any car that could be loaded to go to Newark, N. J., at that time.

Mr. Roads: Was that surplus coal?

Mr. Davis: Any surplus we had over our line shipments. We had contracts.

Mr. Roads: Where is the evidence of that, where is the order—where did you get that order?

Mr. Davis: That came from W. J. Fox, Philadelphia.

Mr. Roads: Was it by correspondence or how?

Mr. Davis: It came in the form of an order.

Mr. Roads: Have you that order here in Court?

Mr. Davis: Yes, sir.

Mr. Roads: Among your slips?

Mr. Davis: Among my slips, yes, sir. Pardon me, this order came through Schillingsford, at Osceola, by 'phone.

Mr. Roads: As I understand, all of these cancellations represented on this sheet to which you have just been referring, were necessitated by reason of shortage of cars that you could not fill the orders, and consequently had to cancel them?

Mr. Davis: Yes, sir.

Mr. Roads: Now, I wish you would produce the orders—have you those cancelled orders in Court here?

Mr. Davis: Among my papers.

Examiner Brown: Unless Mr. Gowen raises some objection about them, I do not think there is any reason for going into that.

Mr. Gowen: I expect to cross-examine the witness on that. We do not by any manner of means admit that the full story has been told.

Examiner Brown: If you are ready to admit that he has some kind of an order, why he need not produce them. You could not give that last order because it was telephoned?

Mr. Davis: It was not cancelled. It was left open to fill.

Mr. Roads: Just give your orders beginning with the year 1902.

(Mr. Davis produced a bundle of papers and handed same to counsel.)

Mr. Roads: Have you got these orders in order?

Mr. Davis: Each year is kept together.

Mr. Roads: Year by year?

Mr. Davis: Yes.

Mr. Roads: And those are the orders the company had for coal which were cancelled for the reason stated, for want of cars?

Mr. Davis: Yes, sir.

Mr. Roads: We produce them in Court.

Examiner Brown: Let them be submitted to Mr. Gowen.

Mr. Roads: You have them year by year here in Court?

Mr. Davis: Yes, sir.

Mr. Roads: Between the year 1902 and 1907?

Mr. Davis: Yes, sir.

Mr. Roads: Now, Mr. Davis, state whether or not you did not have other orders covering this period which you did not accept?

Mr. Davis: Yes.

Mr. Roads: For what reason—what was the main reason, generally speaking, why you refused orders from good people and from your own customers?

Mr. Davis: We had not the cars to fill them.

Mr. Roads: Can't you tell us the proportion of orders from your customers and others which you refused because of shortage in car supply, for fear that you could not fill them—what proportion, in comparison with your total shipments?

Mr. Davis: No, I could not give that.

Mr. Roads: Was it a substantial amount of business compared with your business that you did do?

Mr. Davis: Yes.

Mr. Roads: Could you state whether it was as

much as 25 per cent. or could you put it in the shape of percentage?

Mr. Davis: I could not put in the shape of percentage.

Mr. Roads: A large or substantial part—there were a substantial number of cars covering this period that the company refused because of the fear that they could not have a car supply sufficient to make the shipments.

Mr. Davis: Well, the orders would not come to us. They would write and ask if we would take more business, and of course we would have to refuse it. We did not get a volume of it. We knew that we had orders that were not being filled promptly.

Mr. Roads: Did that happen often?

Mr. Davis: Yes, sir.

Mr. Roads: Was it a substantial part of your business that you lost for that reason?

Mr. Davis: As a general thing, yes.

Examiner Brown: Is it your contention here, Mr. Roads, that there is any provision in the Act to Regulate Commerce upon which the Commission can make an order with reference to the obligations of a common carrier to supply facilities—

Mr. Roads: I do not quite understand.

Examiner Brown: I am speaking of the latter part of Section 1 of the Act—I do not quite understand the contention of your pleadings—it says here: "And it shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation, upon reasonable request therefor, etc." Now, is it your contention there is any power, in the Act to Regulate Commerce, given to the Commission to make an order carrying into effect that provision.

Mr. Roads: There is no question raised here. This petition is filed for the purpose of fixing and recovering damages.

Examiner Brown: That is, for reparation?

Mr. Roads: For failure of the defendant company

to perform the duty devolved upon it by virtue of the Section.

Examiner Brown: That is the point I am making. Of course there is the common law liability which the railroad company is under to its patrons. The Commission has no jurisdiction, I assume, outside of the terms of the statute, and I want to know if it is your contention that the Commission has any power to make an order.

Mr. Krebs: Only where there has been discrimination.

Mr. Roads: Section 16, which is as follows: "That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." And there follows the provision with reference to the day in court the other side may have, etc.

Examiner Brown: Proceed.

Mr. Roads: Now, Mr. Davis, where did you live with reference to Eureka No. 7 operation, and the office of the Bulah Coal Company?

Mr. Davis: I lived in Ramey.

Mr. Roads: In going to and from your work, state whether or not you pass the Eureka No. 7?

Mr. Davis: I do.

Mr. Roads: Is their tipple near the public road?

Mr. Davis: Yes.

Mr. Roads: How near?

Mr. Davis: About 40 feet, I suppose, from the street.

Mr. Roads: State whether or not in going to and from your work you crossed the siding—is there a siding there at the tipple?

Mr. Davis: Yes, sir.

Mr. Roads: What is the number, do you know?

Mr. Davis: No. 7, Eureka No. 7.

Mr. Roads: In passing up and down there, did you count the cars on the siding at the Berwind-White Coal Company's operation at any time after 1902, say September?

Mr. Davis: Yes, sir.

Mr. Roads: How often would you go up and down there?

Mr. Davis: Morning and evening.

Mr. Roads: Have you got a statement of the number of cars and the character of the cars that were on the siding at Berwind-White Coal Company's No. 7 operation?

Mr. Davis: Yes.

Mr. Roads: Have you got the number of the cars?

Mr. Davis: Yes, sir.

Mr. Roads: Did you count those cars continuously, or did you do it intermittently?

Mr. Davis: I took the numbers and initials and capacity of the cars September 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 23d, 25th, 27th, 29th, November 5th, 6th, 10th, 11th, December 27th.

Mr. Roads: It is all set out on a statement?

Mr. Davis: Yes, sir.

Mr. Roads: Was that statement made up by you?

Mr. Davis: Yes, sir.

Mr. Roads: From the data that you made at the time you counted the cars?

Mr. Davis: Yes, sir.

Mr. Roads: Have you the data that you made at the time you counted the cars before you now?

Mr. Davis: I have.

Mr. Roads: And that statement is made up from the data in a book produced in court here, a small book?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the date, April 17th, 1905, down to April 19th, 1905, you have an entry there, "Siding full of cars." Have you got any other entry besides that in reference to the cars standing at Eureka No. 7 as of that time?

Mr. Davis: I don't understand the question.

Mr. Roads: You say here simply this, under date of April 15th, 1905, "Siding full of cars." "April 18th, ditto; April 19th, ditto."

Mr. Davis: No, I took no numbers during those three days.

Mr. Roads: Now, from the 21st down to the 28th you say, "Siding full of cars, and working full time." That refers to Eureka No. 7?

Mr. Davis: Yes, sir.

Mr. Roads: How often during those days did you see the siding full of cars?

Mr. Davis: Twice a day.

Examiner Brown: What date is that?

Mr. Roads: That is April 21st, 1905.

Examiner Brown: Was that during the operation of those mines?

Mr. Roads: It is Eureka No. 7, in favor of which we claim there has been discrimination. We laid the ground for that in the early part of the case by Mr. Minds' examination. (Addressing the witness) State whether or not you have a car record of the cars supplied to Bulah Coal Company at Webster No. 4 Colliery by Pennsylvania Railroad, covering the same date?

Mr. Davis: Yes, sir.

Mr. Roads: On the right-hand side of the sheet is that, and on the left is the data covering the car supply as you found it by personal count on the same dates?

Mr. Davis: Yes, sir.

Mr. Roads: Where did you get that data?

Mr. Davis: From my own records of cars received each day.

Mr. Roads: Have you got that car book in court?

Mr. Davis: Yes, sir (producing a book).

Mr. Roads: What are these books you have produced?

Mr. Davis: Books of record of cars received and loaded each day.

Mr. Roads: That record shows what, the numbers of the cars?

Mr. Davis: The numbers of the cars, the initials and the capacity.

Examiner: And your table is made up from those?

Mr. Davis: Yes, sir.

Mr. Roads: This table is gotten up for what purpose, Mr. Davis?

Mr. Davis: To show a comparison of cars received on even dates by Eureka No. 7, operated by Berwind-White Coal Mining Company, and Webster No. 4, operated by Bulah Coal Company.

Mr. Roads: That is for the purpose of showing discrimination in the car supply between Eureka No. 7 and Bulah Coal Company's Webster No. 4, on these same dates?

Mr. Davis: Yes, sir.

Mr. Roads: Were these dates especially selected or not?

Mr. Davis: No.

Mr. Roads: I offer in evidence a statement entitled "Cars received at B-W C. M. Co.'s Eureka No. 7," and "cars received at Bulah Coal Co.'s Webster No. 4 Colliery."

Examiner Brown: Let it be received and marked, if there is no objection.

(There being no objection, the paper was received in evidence and marked Complainant's Exhibit No. 4 of this date.)

Examiner Brown: What was the rating of Webster No. 4?

Mr. Roads: Sixteen cars a day.

Examiner Brown: And Eureka No. 7, 14 cars?

Mr. Roads: Yes. (Addressing the witness) Did you make requests for car supply?

Mr. Davis: Yes.

Mr. Roads: Now, confining yourself to the period from 1902 to 1907, I wish you would tell us generally the method of your getting the cars, of your making requests, what efforts you made in order to get the company to give you the number of cars for which the mine was rated?

Mr. Davis: Daily requests by their method, whatever they laid out for us, for cars, daily.

Mr. Roads: How was that done?

Mr. Davis: There was a while we had to do it by mail, by written order to the Superintendent's office at Tyrone. At another period we had to do it by telephoning the order to the Houtzdale station.

Mr. Roads: Did they change the method?

Mr. Davis: Yes.

Mr. Roads: What was the new method for ordering the cars?

Mr. Davis: I just stated we would send written orders, and then they would tell us to order them by telephone at the Houtzdale station. Then the method was to leave an order at Madera Junction. They have an operator there. Then at other times they required us to send orders to Osceola to the Train Dispatcher's office.

Mr. Roads: Who required you to pursue that method?

Mr. Davis: The railroad company.

Mr. Roads: Did you make complaints that you were not receiving your allotment of cars as early as 1902?

Mr. Davis: Yes.

Mr. Roads: What efforts did you make in order to get the company to send you that allotment—were you rated prior to 1906?

Mr. Davis: We never knew anything about the rating.

Mr. Roads: So far as you know, was that the custom in this vicinity, that the company did not publish the rating on car allotment for the various operations?

Mr. Davis: I never saw any.

Mr. Roads: And you did not know then, as I understand it, prior to 1906 what the company rated Webster No. 4 at?

Mr. Davis: No.

Examiner Brown: Did they ever tell you how many cars you were entitled to?

Mr. Davis: No.

Mr. Roads: The first published rating then, as I understand it, was in 1906?

Mr. Davis: Yes.

Mr. Roads: Now, as early as 1902, I understand you to say you complained about not receiving a car supply sufficient to handle the output capacity of the mine?

Mr. Davis: Yes, sir.

Mr. Roads: How persistent were your efforts in that direction, and what did you do?

Mr. Davis: There were times when we called them up by telephone daily, urging them to give us more cars.

Mr. Roads: What reason did they give you for not giving the cars?

Mr. Davis: They would often say that they did not have them.

Mr. Roads: Were you idle when No. 7, Eureka No. 7, was working, in 1902, at times?

Mr. Davis: At times, yes, sir.

Mr. Roads: In what proportion, can you say?

Mr. Davis: Well, the data just turned in there gives the number of cars that we should have received, and the number we did receive.

Mr. Roads: That is not continuously. That is only at the times for which it speaks and the dates for

which you have the entires. I want to know, continuously, from 1902, whether the same condition did not prevail, generally, that Eureka No. 7 worked substantially full time, as compared with your working part of the time, because of the shortage of cars to you?

Mr. Davis: They did.

Mr. Roads: Have you correspondence in regard to that with the officials of the railroad company—in regard to car supply?

Mr. Davis: I have.

Mr. Roads: Will you produce it, please, starting with Mr. Blair, the Superintendent of the Tyrone Division.

Mr. Davis: In regard to S. S. Blair, the correspondence, I believe, is in Philadelphia.

Mr. Roads: Well, who is the next official you had communication with?

Mr. Davis: J. K. Johnston.

Mr. Roads: Who is he?

Mr. Davis: Superintendent of the Tyrone Division now, and has been for a number of years.

Mr. Roads: Produce that correspondence, please.

(The witness produced papers and handed same to counsel.)

Mr. Roads: Are these letters in order?

Mr. Davis: It is a short correspondence. I called Mr. Freeman by 'phone.

Mr. Roads: You produce a letter here dated December 17th, 1904. Haven't you letters prior in date to that?

Mr. Davis: That correspondence is in Philadelphia, as I have said.

Mr. Roads: Who has it?

Mr. Davis: In Mr. John H. Minds' office.

Mr. Roads: Why it is not here, is it on its way here?

Mr. Davis: I suppose it is, if Mr. Minds is able to get it and send it.

Mr. Roads: Mr. Minds is sick in the hospital?

Mr. Davis: Yes, sir.

Mr. Roads: He is a son of one of the complainants, Mr. James H. Minds?

Mr. Davis: Yes, sir.

Mr. Roads: He is a member of the Philadelphia bar, is he not?

Mr. Davis: Yes, sir.

Examiner Brown: There need not be any trouble about that. Your opponents have the originals, and any time you can get them you can file them in the case. I have no doubt that they have received them, and I have not any doubt that Mr. Gowen will admit that they received numerous letters from your company, asking that they be supplied with cars.

Mr. Gowen: I don't know, I suppose so. If there is anything to be put in, we will furnish that.

Mr. Roads: You have produced a letter dated December 16th, 1904, signed by James H. Minds, addressed to Mr. R. M. Patterson, Superintendent Freight Transportation, Philadelphia, Pa., as follows:

"Dear Sir:—

We are not receiving many cars, and our Bulah Coal Company cars are not being returned very promptly, so you see by this the amount of trouble we are having with our customers, as we cannot ship them their coal when we do not have the cars. Will you kindly remedy this for us by seeing to it that we receive a better supply of Pennsylvania System cars both steel and wood, and that our own cars be promptly returned, and oblige,

Yours truly,

JAMES H. MINDS,
Superintendent."

The answer is:

December 17th, 1904.

James H. Minds, Superintendent.

Dear Sir:—

Referring to your letter of December 16th, we

are endeavoring to increase the supply of cars to the different regions, and we will move up the Bulah Coal Company cars as promptly as possible, but we are having troubles on the main line which interfere with the movement very materially.

Yours truly,

R. M. PATTERSON,

Superintendent of Freight Transportation."

Mr. Roads: I offer in evidence these letters in connection with the other correspondence already offered in the case, to show that demands and frequent requests were made on the part of the complainant.

Examiner Brown: They can all be introduced, and then if there are any you wish especially to read into the record you can do so.

Mr. Roads: Mr. Davis, what was the effect on the miners going to work in case the delivery of cars was delayed at Webster No. 4, when they were put in at a late hour in the day?

Mr. Davis: The miners would wait a certain time, say half an hour, and if the cars were not there, they would go home.

Mr. Roads: Was that the usual thing with the miners?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the memorandum here under date of June 16th, 1902, did you make a memorandum of instances of that kind where there was a delay in the delivery of cars, in there being run in in the morning or in the course of the day, and how it affected the operation of the plant, and how it delayed the loading?

Mr. Davis: Yes, sir.

Mr. Roads: Did you make the memoranda at the time?

Mr. Davis: At the time.

Mr. Roads: And have you that memoranda before you?

Mr. Davis: I have.

Mr. Roads: Under date of June 16th, 1902, referring to that, tell us what occurred in reference to that subject at that time?

Mr. Davis: June 16th, waited and held our men one hour this morning waiting for P. R. R. Company to push cars in on siding.

Mr. Roads: Held them from what time.

Mr. Davis: We had two cars at the tipple, and after loading them we remained idle for an hour before the cars were pushed in. They were set off at Vulcan while the freight would go down and branch to Madera and intermediate points and push the freight back.

Mr. Roads: Explain that again, the method that the Pennsylvania Company pursued.

Mr. Davis: When they brought a train of cars to Madera Junction—

Mr. Roads: Which direction is Madera Junction from Webster No. 4?

Mr. Davis: Going towards Houtzdale and Osceola.

Mr. Roads: What direction?

Mr. Davis: Northeast.

Examiner Brown: As I understand this line runs up from Osceola and then there is a branch that runs to Eureka No. 7, and one to Webster No. 4?

Mr. Roads: Eureka No. 7 is on that branch, and there is a siding there. (Addressing the witness) Now, then, when a train of cars comes up from Osceola just describe the method of the company in distributing the cars on that trip?

Mr. Davis: When they reached Madera Junction, our cars were set off.

Mr. Roads: Coming up the branch, what operation did they first come to?

Mr. Davis: Eureka No. 7 is right near this junction point and they placed Eureka's cars—

Mr. Roads: The empties?

Mr. Davis: Empty cars, and would go on down the line toward Madera.

Mr. Roads: Is that past Webster No. 4?

Mr. Davis: Past our branch, that goes by Webster.

Mr. Roads: How far do they continue on to Madera? Go on and describe that.

Mr. Davis: After setting off these few cars for us at the branch, at the Madera Junction, they go down to Madera and place cars down there and return with loads to the top of the hill, the junction, and then push our empties in.

Examiner Brown: While they were up there with the load your cars were on the siding?

Mr. Davis: Yes, sir.

Mr. Roads: What siding was that?

Mr. Davis: The Junction siding at the top of the hill.

Mr. Roads: It is not your siding at the tipple?

Mr. Davis: No, we are out on a branch.

Mr. Roads: How far away from your tipple is that?

Mr. Davis: About half a mile.

Mr. Roads: After they came back from Madera, then it was that they ran in these empties on your siding, is that right?

Mr. Davis: Yes, sir.

Examiner Brown: If they did the same thing with Eureka No. 7 you weren't discriminated against?

Mr. Davis: They placed their cars after setting ours off, and then they would go on down and place ours afterwards.

Mr. Roads: When your cars were placed on Vulcan siding, they were not available to you?

Mr. Davis: No, sir.

Mr. Roads: But when cars were placed on Eureka No. 7 they were ready for that operation?

Mr. Davis: Yes, sir.

Mr. Roads: What time of the day would you get your allotment of cars by that operation?

Mr. Davis: Often eight or nine o'clock.

Mr. Roads: What time would Eureka No. 7 get theirs?

Mr. Davis: Along about seven o'clock.

Mr. Roads: Then there would be a delay of about two hours in the delivery at the two points?

Mr. Davis: Quite often we would have a part of a car to load and we would load that, the men would be on the inside, and we would hold them waiting until the cars came in.

Examiner Brown: Did you ever call the attention of the Pennsylvania Railroad Company's officials to this method of car distribution?

Mr. Davis: The man at the junction, we would call his attention to that. He said they did not have time.

Mr. Roads: What time would the men go to work?

Mr. Davis: Half-past six or seven o'clock.

Mr. Roads: What would be the result of the delay in that way on the men going to work?

Mr. Davis: Had to pay the company hands working about the mines for that hour when there was nothing to do.

Mr. Roads: Was this a steady or regular thing?

Mr. Davis: It occurred frequently.

Mr. Roads: How frequently, say?

Mr. Davis: Twice or three times a week.

Mr. Roads: Covering what time?

Mr. Davis: During all this time.

Mr. Roads: From 1902 to 1907?

Mr. Davis: Yes, sir.

Mr. Roads: As much as two or three times a week?

Mr. Davis: Yes, sir.

Mr. Roads: Say whether or not that would result in the men going home?

Mr. Davis: It would, if we had no cars to start on. Not if we had one or two cars in.

Mr. Roads: It frequently happened that the result of that method of delivery of cars would be that the men would not work that day, at least the miners would not go in, did it not?

Mr. Davis: They would not go in if we had no cars to start on.

Mr. Roads: Do you know whether the company charged the Bulah Coal Company for those cars as part of their allotment for the next day?

Mr. Davis: That is what the railroad men claimed that they were charged up to us, whatever was standing in the evening, as cars available for loading.

Mr. Roads: What have you to say in reference to the item or occurrence under date of June 18th, 1902?

Mr. Davis: Waited that morning from 7.45 to 9.00 o'clock for the railroad to push our cars in on siding, and then only got five P. & R. cars.

Mr. Roads: P. & R. cars?

Mr. Davis: Yes, Reading cars, foreign cars.

Mr. Roads: Is the same thing true of July 21st, 1902?

Mr. Davis: Yes, sir.

Examiner Brown: Is there a transcript of that record made here in the statement?

Mr. Roads: No, sir. These are individual instances, personal instances.

Examiner Brown: I did not know but what you had it tabulated.

Mr. Roads: There is a tabulation, but that refers to the books.

Examiner Brown: Very well, go ahead.

Mr. Roads: Now, take up these instances of which you have memoranda, the instances you have noted there.

Mr. Davis: Give me the date and the page.

Mr. Roads: Under date of July 23d, 1902, page 10 of your book.

Mr. Davis: Waited for P. R. R. Company to put

cars on side track, waited for one hour, they set off four P. R. R. cars at Vulcan, and went on down the run. When they came back—

Mr. Roads: Set them off at Vulcan?

Mr. Davis: That is the siding at this junction point. It is called Vulcan Branch.

Mr. Roads: Were those cars set off on Vulcan Branch available to your tipple?

Mr. Davis: No, sir.

Mr. Roads: Now, the next date is September 3d.

Mr. Davis: Telephone from S. S. Blair, asking for five extra cars for supply coal to stop at their stations along the line. Request granted by Mr. Minds.

Mr. Roads: That same thing is true, is it not, of September 8th, 19th, 29th and 30th?

Mr. Davis: The 'phone call is from Mr. Stein on the 30th, that is the only difference.

Mr. Roads: Take up March 31st, 1903, page 17.

Mr. Davis: March 31st, 1903, 10.00 o'clock A. M., Mr. Fred Vrooman 'phoned from Osceola Tower that they were holding Bulah Coal Company cars up as there was no arrangement yet with the P. R. R. for hauling said Beulah Coal Company cars, and that they were now holding car No. 445.

Mr. Roads: Go ahead, Mr. Davis, please, and take up the next item under date of February 16th, 1903.

Mr. Davis: I don't find that.

Mr. Roads: Take June 26th, 1903, page 17.

Mr. Davis: Railroad Company set off at Madera Junction five line cars and three B. C. Company cars at 7.55 this morning for Webster No. 4, but No. 4 did not start, so these five line cars were placed on Eureka No. 7 siding and loaded by Berwind-White Coal Mining Company. On June 27th three B. C. Company cars were, with one other B. C. Company car, placed on our siding at 7.40 A. M., stating that they did not have five other cars to give us this morning, that they were taken to Berwind-White's.

Mr. Roads: August 4th, 1903, what occurred then?

Mr. Davis: August 4th, 1903, cars Nos. 3659 P. & N. W., 49334 P. R. R., 59259 P. R. R. 22631 P. C. C. & St. L., 35131 P. R. R. placed on Vulcan Branch about noon, not put on our side track until August 6th at about 10.00 A. M. We had to wait over an hour for these cars after loading a couple of Bulah cars in the meantime.

Mr. Roads: These cars, accoring to that, laid there on Vulcan siding for two days?

Mr. Davis: Yes, sir.

Mr. Roads: November 12th, 1903?

Mr. Davis: Cars P. R. R. 59949, 46354, B. C. Co. 499, were placed on Vulcan Branch at Madera Junction on afternoon of November 11th, not put on our siding until 3.30 P. M. on the 12th. We were idle on the 12th by not having these cars.

Mr. Roads: What is the distance from that Vulcan siding, did you say, up to your tipple siding?

Mr. Davis: About half a mile, a little over, possibly.

Mr. Roads: Then you were idle on account of that fact, that these cars were run on this Vulcan Siding on the 11th and were not brought up to you until the 12th, and the distance is about half a mile?

Mr. Davis: About half a mile.

Mr. Roads: And then not until 3.00 o'clock in the afternoon of the 12th?

Mr. Davis: 3.30.

Mr. Roads: November 17th, 1903, what occurred then?

Mr. Davis: November 17th, 1903—referring back to November 11th, we shipped seven cars to F. C. Shuey, South Amboy, and on November 13th, one car to F. C. Shuey, to South Amboy, making eight cars in all. These eight cars were held at Tyrone scales until November 17th. We received no notice of such holding except by Mr. Wingate talking with Mr. Minds he said

he saw a message at Osceola to the effect that those eight cars were held, so at 10.00 o'clock today, being the 17th, I called Hughes at Osceola tower and asked about it. Hughes said these eight cars were held on account of having no permission to allow these eight cars to go forward.

Mr. Roads: Was there ever any explanation made as to why those eight cars were detailed at Osceola?

Mr. Davis: No.

Mr. Roads: December 17th, 1903, what have you there for that date?

Mr. Davis: Four steel cars, Nos. 21427, 56677, 130245 and 59766, loaded and manifested December 15th, A. M., was not taken out from our siding until December 17th, A. M.

Mr. Roads: State whether the freights passed up and down there during that time?

Mr. Davis: Yes, sir.

Examiner Brown: Did you get any other cars in the meanwhile?

Mr. Davis: That was on the 15th. We were idle on the 15th, 16th, 17th and 18th.

Mr. Roads: December 30th, 1903, tell us if you have an occurrence there, and what it was.

Mr. Davis: December 30th, 1903, at 2.50 P. M. freight put in three B. C. Co. cars Nos. 483, 478 and 499. These cars stood on Vulcan Branch since December 30th, and we were without cars, and when they did come in they only took out two loads and left the balance of the loads.

Mr. Roads: Was there any explanation of why that was done, why they took out part of the cars, and left part of them standing?

Mr. Davis: Yes, the only excuse they ever gave was that they had not time.

Mr. Roads: January 4th, 1904.

Mr. Davis: January 4th, 1904, at 3.00 o'clock P. M., freight took out cars 9081 Penna. Company, that

had been loaded and manifested December 30th, 1903, and B. C. Co. car 487, that had been manifested December 31, 1903.

Mr. Roads: When were they taken out on the siding?

Mr. Davis: I just gave the dates, January 4th, 1904.

Mr. Roads: And all that time they laid there loaded?

Mr. Davis: Loaded and manifested.

Examiner Brown: What do you mean by manifested?

Mr. Davis: Card made out for shipment, showing destination and consignee.

Examiner Brown: To whom did you hand that, the conductor?

Mr. Davis: When he came in for the cars.

Examiner Brown: Where did you make that, in your office?

Mr. Davis: Yes, sir. It is a card for them, showing the destination and consignee.

Examiner Brown: You afterwards received a bill of lading?

Mr. Davis: No, the bill of lading follows the car to destination.

Mr. Roads: Was this delay caused in any way by your not doing anything that was necessary to be done?

Mr. Gleason also read from the record of the Interstate Commerce Commission the following testimony, appearing at page 125:

Mr. Roads: As I understand, you had uncancelled orders to load nineteen additional cars, and that number of cars was not furnished you by the company?

Mr. Davis: Yes, sir.

Mr. Roads: Now, in addition to that, you had an order as indicated by the character "x" preceding the numbers under the column short—you had orders from Whitney & Kemmerer to ship all separate coal to Amboy?

Mr. Davis: Yes, sir.

Mr. Roads: So that the effect of the treatment you received, as indicated by this schedule where it is marked "x" was that you had to cancel orders which would have required the number of cars set out in the cancelled column. You had, in addition, a shortage of the number of cars indicated, to wit, under the entry of July, 1902, nineteen cars short of those that were still uncancelled, and you lost, in addition, by the shortage of car supply, the opportunity to fill the order of Whitney & Kemmerer to ship all surplus coal to Amboy, N. J.?

Mr. Davis: Yes, sir.

Mr. Roads: That general statement holds good in regard to all these characters on this sheet?

Mr. Davis: Yes, sir.

Mr. Roads: Mr. Davis, have you got the books here from which you can tell us the number of full days worked during the years from 1902 to 1907 inclusive?

Mr. Davis: Yes, sir.

Mr. Roads: Produce them, please.

(Witness produced books.)

Mr. Roads: What do you call that book?

Mr. Davis: This is compiled from our car book where we keep the cars received, cars shipped, and the time the mine worked.

Mr. Roads: Can you tell us what portion of the day, for instance, the mine was worked during the entire year of say 1902?

Mr. Davis: Yes, sir.

Mr. Roads: Was that book kept by you?

Mr. Davis: Yes, sir. I have the book here.

Mr. Roads: Is that the book of original entries in regard to this, kept by you each day?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the year 1902, November 1st, tell us just on that first column what those figures mean, showing the method or how you kept that time?

Mr. Davis: November 1st, four cars loaded, total of four cars in the month; time worked one-fourth day. Did not work any then until the 3d, seven cars, making a total of eleven cars for the month, worked three-fourths of a day.

Examiner Brown: And from that you made up this statement?

Mr. Davis: Yes, sir.

Mr. Roads: Every day you kept that record, showing the time that the operation worked?

Mr. Davis: Yes, sir.

Mr. Roads: From day to day, covering the entire year of 1902, and you have that book before you?

Mr. Davis: Yes, sir.

Mr. Roads: From that book did you compile that data into another one?

Mr. Davis: Yes, sir.

Mr. Roads: What do you call that book?

Mr. Davis: That is the data book.

Mr. Roads: That book you have before you in Court?

Mr. Davis: Yes, sir.

Mr. Roads: Now tell us, what portion of the day —in other words, state whether or not you worked one full day in the year 1902?

Mr. Davis: No, worked no full day.

Mr. Roads: Can you tell us the average portion of the day or not?

Mr. Davis: I have not the total of the various fractions of days worked. I have the total of the year.

Mr. Roads: This refers to working days?

Mr. Davis: Working days. I do not just understand what you wish.

Mr. Roads: I want to know, if you can tell us, what proportion of the day the average was for the whole year?

Mr. Davis: The most any one day we worked was three-quarters of a day during the year 1902.

Mr. Roads: What was the occasion of that?

Mr. Davis: The lack of cars.

Examiner Brown: What do you call a day, how many hours?

Mr. Davis: At that time a ten-hour day.

Examiner Brown: Out of a possible ten-hour day you worked not to exceed an average of three-quarters of a day?

Mr. Davis: No, not the average. The longest day we worked during that year was three-quarters of a day.

Examiner Brown: What was the average for the year?

Mr. Davis: I don't know the average. We worked quarters and halves.

Examiner Brown: How many days did you work in the year all told, have you got that?

Mr. Davis: Yes, sir. For the year 1902 a total of 139¼ days, counting three fractions.

Examiner Brown: Out of a possible 312 days you worked 139¼ days?

Mr. Davis: Yes, sir.

Mr. Roads: Can you tell us readily how many days in the year you worked but half time? Could you do that readily—or quarter time, for instance—the number of times, the number of days?

Mr. Davis: I can give it monthly.

Mr. Roads: Well, give it to us that way.

Mr. Davis: January, worked eleven three-quarter days, eleven half days and three quarter days. February eleven three-quarter days, three one-half days, five quarter days. March two three-quarter days, nine half days and six quarter days.

Mr. Roads: Is that about a fair sample of how it runs throughout the year?

Mr. Davis: Yes, that is about the way it ran on along.

Mr. Roads: Give us the first six months, carry it on through to July 1st.

Mr. Davis: April eleven one-half days and seven quarter days. May ten three-quarter days, twelve one-half days and one one-quarter day. June fifteen three-quarter days, seven one-half days and two one-quarter days. July sixteen three-quarter days, six one-half days and three one-quarter days. August twelve three-quarter days, eight one-half days and four quarter days. September six three-quarter days, nine one-half days and four one-quarter days. October sixteen three-quarter days, five one-half days and three one-quarter days. November two three-quarter days, four one-half days and eight one-quarter days. December four three-quarter days, eight one-half days and ten one-quarter days.

Mr. Roads: How many full days did you work in 1903?

Mr. Davis: We worked 33 full days.

Mr. Roads: In 1904, how many full days did you work, and follow that up year by year to the present time.

Mr. Davis: Thirty-eight full days in 1904; 1905, 34 full days; 1906, 26 full days.

Examiner Brown: I understand that these 26 full days are scattered over the year 1906 in different months?

Mr. Davis: Yes, sir.

Examiner Brown: But all added together that year amounted to only working 26 days?

Mr. Davis: Twenty-six full ten-hour days, besides fractions. I can give you the total for 1906. Do you want all these given?

Examiner Brown: No, I do not think that is necessary.

Mr. Roads: Where were you last, 1907.

Mr. Davis: No, 1906.

Mr. Roads: Finish that up for 1907 to July 1st?

Mr. Davis: 1907, to July 1st, worked 100 full days.

Mr. Roads: Out of a possible what number of days in the year—every day but Sunday?

Examiner Brown: It would be 312 days in the year.

Mr. Roads: Can you tell us how it comes that you worked 100 days for the first six months in 1907, as against the other number of full days that you worked for the years prior to that time?

Mr. Davis: We were working eight-hour days at that time and we had a very light force on on account of the supply of cars that we had, and it takes longer to load the cars given us.

Mr. Roads: State whether or not it was by reason of cars that were furnished you in the first six months of 1907 that you were enabled to work 100 days as against the number of days you worked prior thereto —was the car service better?

Mr. Davis: Not materially better. We were working a very light force, was the chief reason. I cannot say that the car supply was increased. It was perhaps more regular at that time."

Mr. Gleason also read from the record of the Interstate Commerce Commission the following extract from letter from Anthony P. Trump, General Superintendent of Transportation of Pennsylvania Railroad Company, appearing at page 254 thereof, as follows:

"Now, our average distribution is about as follows:

System cars for company coal, 21 per cent.

Foreign cars for supply coal, 6 per cent.

Individual cars, 45 per cent.

System cars for commercial coal, 25 per cent.

Foreign cars for commercial coal, 3 per cent.

Now, I assume that you are familiar with our method of distribution which deducts from the mine capacities before a prorate is made all cars which may be assigned to mines such as company coal cars and individual cars. This we consider proper and in as

much as these assignments are necessary the remainder constitutes the actual proratable capacity to which the general distribution of cars is applied."

Mr. Gleason also read from the record of the Interstate Commerce Commission the following, appearing at page 257:

"Mr. Krebs: Mr. Gowen spoke to me about Mr. Trump and Mr. Atterbury going away this evening. I do not believe that we will be able to close this case finally if they are going to offer testimony, or if we have got to get those sheets and summaries that we have spoken of.

Examiner Brown: This hearing does not depend upon the production of those sheets. You can get those out and send them to Washington any time. As I understand, some bookkeeper of the Coal Company, and some one representing the railroad company, the auditor of the Railroad, can get this information up and it can be submitted to you and Mr. Gowen or to Mr. O'Laughlin, and you can agree upon it, and send it to Washington where it will be filed with the papers in the case. We certainly cannot examine the books here, there is no opportunity. It would take all summer. We cannot do that.

Mr. Krebs: I think all the information we require in this case can be furnished from the Cresson office. If they will agree that after the adjournment here we may send an accountant to the Cresson office, and they will permit us to go over these sheets, rating and distribution sheets, we need not waste the time here.

Examiner Brown: There is no trouble about that, is there, Mr. Gowen?

Mr. Gowen: None.

Mr. Krebs: Then the same arrangement probably can be made later on as to the other case?

Mr. Gowen: I do not want the Judge to be too san-

guine as to how long it will take. Mr. Trump, how long have the Webster people been at our books?

Mr. Trump: Three months.

Examiner Brown: I think if you would take out of each year say a quarter, that will give you a basis for your argument.

Mr. Krebs: As I understand counsel in the other case, in which I am only assisting, agree that Mr. Trump may go—they subpoenaed him, I did not—if this testimony which was taken here can be considered as taken in all four cases.

Examiner Brown: That was the understanding, in the beginning. You are through with Mr. Trump?

Mr. Krebs: Yes, sir.

Examiner Brown: Is there anybody else you want to examine who wants to go away?

Mr. Krebs: I don't want to examine Mr. Atterbury. He was subpoenaed in the other case. I did not subpoena either one of these gentlemen. I know your Honor's anxiety to get away, and also your anxiety to work at night in order to accomplish that. I am hardly in condition to work at night.

Examiner Brown: Perhaps we can take up another case.

Mr. Krebs: Counsel in the other cases do not wish to detain Mr. Atterbury. At this stage they do not want to examine him. They are perfectly willing for him to go away now, and if the case at Harrisburg should be closed before we get through here we will telegraph or call him and ask him, if it is necessary for him to do so, to come back. As to the summary and the distribution sheets, as I understand, we will make the same arrangement in those cases that we have here.

Examiner Brown: Yes, sir.

Mr. Krebs: That can be done at Philadelphia, Mr. Trump?

Mr. Trump: Yes, sir.

Examiner Brown: If you do not want to go on tonight, Judge Krebs, do counsel in the other cases desire to take up either of those tonight?

Mr. Krebs: I think you will get away within the three days without any question, in view of the agreement about these sheets.

Examiner Brown: With the understanding that we will get through here by Wednesday evening, I will not hold an evening session."

Mr. Gleason also read from the record of the Interstate Commerce Commission the following, appearing at page 278:

"Mr. Roads: And we are to get the distribution sheets for the Moshannon district?

Mr. Gowen: You want to go over them yourselves?

Mr. Roads: We will be perfectly willing to accept the same arrangement you made in the other case.

Mr. Gowen: Just as you prefer.

Mr. Roads: It will be satisfactory to us. On the Moshannon Branch we want the car distribution sheets to Eureka No. 7 and Webster No. 4.

Mr. Trump: That we cannot give you because all the Eureka mines are consolidated together on all of our sheets. We could not give you No. 7 separated from the others, all these Eureka mines are consolidated under one operation. We have not the details of No. 7.

Mr. Roads: Do you mean to say, Mr. Trump, that the entire Eureka operation gets a certain number of cars?

Mr. Trump: On the old sheets, yes, sir, they are taken together for several reasons.

Examiner Brown: Do the recent sheets show the different Eureka operations separately?

Mr. Trump: No, sir; they are all together.

Mr. Krebs: Do not your distribution or rating

sheets show the number of cars, the percentage of cars, which each of the Eureka mines is entitled to?

Mr. Trump: No, sir; not the old sheets. The present sheets do. They show a consolidated rating and a consolidated delivery. They do show the kind of cars, that is coal Company, individual and commercial, but the records are all put together.

Mr. Krebs: Don't your old sheets show, for instance, Eureka No. 26, No. 27 and No. 7 separate, with the percentage of cars they are entitled to?

Mr. Trump: Yes.

Mr. Krebs: If you will give us a copy of that and the whole number of cars given to Eureka, that will be satisfactory.

Mr. Trump: In a great many cases the mines have been consolidated, showing three mines in a group, and each mine is given a proportion of that supply. The whole number of cars delivered are charged up to the three mines. I want to explain that because it would not be possible to give you the number delivered to No. 7 unless we went to the car record office and we could furnish that by the car record office, but it would be a long job.

Mr. Krebs: I do not understand you that our request in the Clark Brothers Coal Mining Company case cannot be complied with in that respect?

Mr. Trump: In the Clark Brothers case there is no large number of mines to be consolidated.

At 3.10 P. M. Court adjourned until Wednesday, October 11, 1915, at 10 A. M.

Philadelphia, October 11th, 1916, 10 a. m.

Present: Parties as before noted.

Mr. Roads: If the Court please, we ask that these distribution sheets be marked for identification.

(Distribution sheets marked as follows:

"Exhibit A", package marked "Tyrone Division, Coal Car Distribution Sheets, Jan. to June, inc., 1907", the seal being broken.

"Exhibit B", package marked "Tyrone Division, Coal Car Distribution Sheets, Oct. 1904, Nov. 1904, Dec. 1904, Year 1905", being sealed.

"Exhibit C", package marked "Tyrone Division, Coal Car Distribution Sheets Year 1906", being sealed.)

MR. GLEASON: There is one part of the record of the Interstate Commerce Commission that has not been read, that I might refer to in my argument.

THE COURT: Each side is at liberty to refer in the argument to the jury and read to the jury anything that is in the record. The other proposition is this, that to avoid unnecessary extension of this record, the technical record, we give you leave to read into the technical record whatever part of that other record you choose to read in. Both these propositions are stipulated.

MR. GLEASON: It will only be used for reference to the jury.

PLAINTIFFS CLOSE.

DEFENDANT'S SUR-REBUTTAL.

MR. BIKLE: I read from page 54 of the report of the Interstate Commerce Commission in the two cases heretofore described and which have eventuated in this trial the following paragraph:

"The complainants characterize as a special discrimination against their mine the fact, as is al-

leged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding, and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusion, or anything to indicate that the complainants in those respects were put by the defendants on any less favorable basis than their competitors."

I read the first sentence for the second paragraph of the same opinion, found on page 55:

"While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations."

DEFENDANT CLOSES.

TESTIMONY CLOSED.

Counsel for the plaintiff and defendant argued the case to the jury.

At 12.15 p. m. Court took a recess until 1.30 p. m.

INTERSTATE COMMERCE COMMISSION.

WASHINGTON.

I, GEORGE B. McGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of a blue print entitled "Tyrone Division of P. R. R.", the original of which was transmitted to the Commission with letter of Mr. John H. Minds dated January 11, 1909, and is now on file and of record in the office of this Commission in Docket No. 1136, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, against Pennsylvania Railroad Company.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and affixed the seal of
(Seal) of said Commission, this 7th day of October, A. D. 1916.

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.